NO. 86-230

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

LINDA NICHOLSON, DONALD NICHOLSON AND UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioners

VERSUS

NANCY H. KING,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Although there is no absolute constitutional prohibition of judicial re-examination of a jury's findings, whether an appellate court's reversal of a jury's findings on the basis of its own assumptions, evaluations of credibility, and reconstruction of facts on the basis of unproven "scientific" formulas violates fundamentals of the American system of justice embodied in the due process clause of the Fourteenth Amendment?

2. Whether an appellate court's re-examination of a jury finding by resort to factors beyond the record, without providing notice of intent to consider the factors and without affording an opportunity to contest the new factors, violates principles essential for due process?

3. Whether the constitutionally protected right to a fair hearing was denied to an appellee by an appellate court which reversed a jury's findings and render its own de novo judgment on the basis of a factual issue, which the appellant did not raise, the court did announce until its decision was rendered, and the appellee did not have the opportunity to address?

LIST OF ALL PARTIES

Nancy H. King	Plaintiff/ Appellant/Respondent
Elton J. King	Plaintiff/Appellant*
Mandy Kelly (individually and as father of the minor, Anthony Kelly)	Defendant/Appellee**
State Farm Mutual Automobile Insurance Company (Liability insurer of Anthony Kelly and Mandy Kelly)	Defendant/Appellee**
Cumis Insurance Society, Inc. (Uninsured motorists carrier for Nancy H. King)	Defendant***
Linda Nicholson	Defendant/ Appellee/Petitioner
Donald Nicholson (husband of Linda Nicholson)	Defendant/ Appellee/Petitioner
United Services Automobile Association (Liability insurer of Mr. and Mrs. Nicholson)	Defendant/ Appellee/Petitioner

* No action taken since judgment of appellate court. No longer involved in these proceedings.

** No action taken since appellate court decision.

*** Satisfied judgment against it before appeals were taken. No longer involved in these proceedings.

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JURISDICTION

Following a trial by jury, judgment was rendered on November 16, 1983, by the Louisiana Civil District Court for the Parish of Orleans, in favor of Linda Nicholson, Donald Nicholson and United Services Automobile Association, dismissing all claims against them. The same court, on December 14, 1983, denied a Motion for Judgment Notwithstanding the Verdict and alternatively for a New Trial. On March 12, 1986, the Louisiana Court of Appeal for the Fourth Circuit reversed the judgment of the Civil District Court and rendered its own judgment against petitioners. On May 12, 1986, the Louisiana Supreme Court issued an order by which it declined to issue a writ of certiorari

Jurisdiction of this Honorable Court is conferred by 28 U.S.C. Sec. 1257(3). The action of the Louisiana Supreme Court, in declining to review and reverse the decision by the court of appeal, in effect, held that the Louisiana Court of Appeal exercised its statutory power to review factual conclusions in a constitutionally permissible manner. Petitioners submit that this interpretation of Louisiana Constitution art. 5 Sec. 10, giving State Appellate Courts the right to review factual determinations of trial courts, violates petitioner's rights under the 14th Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS

U.S. Constitution, 7th Amendment

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Constitution, 14th Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Constitution, Art. 5 Sec. 10

> (A) Jurisdiction. Except in cases appealable to the supreme court and except as otherwise provided by this constitution, a court of appeal has appellate jurisdiction of all (1) civil matters decided within its circuit and (2) matters appealed from family and juvenile courts, except criminal prosecutions of persons other than juveniles. It has super-

visory jurisdiction over cases in which an appeal would lie to it.

(B) Scope of Review. Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts.

Louisiana Code of Civil Procedure, Art. 1797

A. If a trial is by a jury of six, five of the jurors must concur to render a verdict unless the parties stipulate otherwise.

B. If trial is by a jury of twelve, nine of the jurors must concur to render a verdict unless the parties stipulate otherwise.

Louisiana Code of Civil Procedure, Art. 2166

A. Within fourteen days of the mailing of the notice of the judgment and opinion of the court of appeal, a party may apply to the court of appeal for a rehearing. Within thirty days of the mailing of the notice of the judgment and opinion of the court of appeal, a party may apply to the supreme court for a writ of certiorari. The judgment of a court of appeal becomes final and definitive if neither an application to the court of appeal for rehearing nor an application to the supreme court for a writ of certiorari is timely filed.

STATEMENT OF THE CASE

After striking and killing two children with his automobile, fleeing the scene, and pleading guilty to negligent homicide, Anthony Kelly attempted in this lawsuit, to implicate another motorist as an excuse for his actions. A civil jury was obviously not impressed with Mr. Kelly's testimony; Mr. Kelly, the accuser, was found to have been solely at fault for the accident and Mrs. Nicholson, the accused, was totally exonerated from any responsibility for the injuries to and death of the two children of Nancy King.

When Nancy King appealed the decision, the state appellate court became its own self-appointed accident reconstructionist and on the basis of its own calculations, went beyond the record to reverse the jury's findings and imposed liability on Mrs. Nicholson. In reconstructing the accident, the court of appeal assumed facts at will, used unproven and incorrect formulas, and ignored testimony that the jury found to be credible.

The accident occurred at approximately 7:50 a.m. on Friday, October 3, 1980 at a "T"-intersection, which was formed by Chef Highway and Crowder Road. Chef Highway, a six-lane divided road accommodating east and westbound traffic, is the through top of the "T". Crowder Road, a four-lane divided street accommodating north and southbound traffic, has a stop sign on the north side of the intersection but no controls on the median between the east and westbound lanes of Chef Highway.

At the time of the accident, Linda Nicholson, who was driving a Volkswagen van/bus, completed a left turn from the left southbound lane of Crowder Blvd. into the right eastbound lane of Chef Highway and began to proceed in an easterly direction in that right lane. Nancy King's two children

were standing at a bus stop on the south side of the eastbound lanes of travel on Chef Hwy. The bus stop was located 93' east of the edge of Crowder Road from which Mrs. Nicholson entered the intersection (the measurement was made on a straight line along the southern curb of Chef Hwy.). Anthony Kelly, who was 15 years of age, was operating his father's Mercury Cougar automobile in the right eastbound lane of travel on Chef Hwy. at a speed which was admittedly above the posted speed limit of 45 m.p.h.

Mrs. Nicholson testified that, she stopped her van in the median of Chef Hwy. and did not commence her turn until traffic had cleared and there was no approaching traffic for a distance of two to three blocks. It was shown that it was reasonable for the Kelly automobile to have been located two to three blocks away when Mrs. Nicholson started forward. Mrs. Nicholson then safely proceeded to enter the right eastbound lane of traffic and drove to a point adjacent to a portable sign when she heard a commotion to her right rear. (Using the same measurement technique, the portable sign was determined by the investigating officer to be 149'11" east of the Crowder Road reference point.) She then observed the Kelly automobile passing her on the right; it proceeded back onto the roadway, and sped away.

Mr. Kelly testified that Mrs. Nicholson's Volkswagen van made a left turn directly across his path and forced him from the roadway. There were numerous inconsistencies and conflicts in Mr. Kelly's testimony, particularly concerning the following factors: whether he saw the van before it was fully in the right eastbound lane of travel and heading directly eastbound; whether there was a black automobile to his left and, if so, whether the black automobile was ahead of or behind his automobile; whether he applied his brakes and skidded before leaving the roadway as he first alleged, although no skid marks were found; whether he ever applied

his brakes at any time before leaving the roadway; and his speed before leaving the roadway.

Of the few major facts to which both Mrs. Nicholson and Mr. Kelly testified and which remained uncontradicted were: (1) except perhaps for the controversial black Chevrolet, there were no other eastbound automobiles ahead of the Kelly automobile when it was a distance of approximately two blocks from the intersection; and (2) the Kelly automobile struck the King children before it reached and passed the Nicholson van. The jury found that Mrs. Nicholson acted reasonably under the circumstances and that the accident occurred solely because Mr. Kelly, an inexperienced driver who was operating his vehicle at an excessive rate of speed, was apparently distracted while adjusting the radio or reaching for a doughnut from a box located on the front seat. Although a civil jury verdict in Louisiana requires concurrence of only 9 members, the verdict in this case was unanimous.

The plaintiff, Nancy King, filed a Motion for a Judgment Notwithstanding the Verdict and, in the alternative, for a New Trial. That motion was heard before the same Judge who presided over the jury trial. The motion was denied on the basis that the result was correct.

Mrs. King then appealed the decision, which exonerated Mrs. Nicholson from fault on the ground that the jury instructions were inadequate and, therefore, the verdict was incorrect as a matter of law. The sole assignment of error was: "The failure of the trial judge to include in its charge to the jury any instructions bearing upon the central issues of fact relating to the allegations of negligence on the part of defendant, Linda Nicholson, and to her insurer, U.S.A.A. was manifestly erroneous and requires reversal of the judgment below." (King Brief, Appendix p. A-71).

Without notice of its intentions, the appellate court did not rule on the alleged error of law but instead embarked upon a mathematical reconstruction of the accident in which it: (a) used formulas for maximum acceleration, which formulas were not in the record of evidence (Decision, Appendix p. A-116); (b) gratuitously added and subtracted a second or so to its acceleration computations because it was not certain whether the van's engine was capable of maximum acceleration (Decision, Appendix p. A-116); (c) rejected the testimony of Mrs. Nicholson that she was adjacent to the portable sign (149 11" east of the Crowder Road reference point) when her van was reached and passed by the Kelly automobile (Decision, Appendix p. A-113); (d) selected the police officer's estimate of the length of the van in preference to Mrs. Nicholson's estimate of its length (Decision, Appendix p. A-111); (e) assumed that the van turned in a perfect arc and computed the actual turning path of the van, which no one else, including the expert accident reconstructionist who testified at the trial, attempted to do (Decision, Appendix p. A-111); (f) assumed that the Nicholson vehicle was not 149'11" east of the Crowder Road reference point (Decision, Appendix p. A-115); (g) assumed a direct measurable difference between the Nicholson van and the Kelly automobile on the basis of the point at which the automobile left the roadway and of selected general estimates (Decision, Appendix p. A-112); and, (h) taking judicial notice of traffic conditions in the along Chef Hwy. during the morning hours (Decision, Appendix pp. 113, 114).

The court of appeal, on the basis of its own calculations rather than Mrs. Nicholson's testimony, determined that the Nicholson van was only 64' (rather than 149'11") east of the Crowder Road reference point when the Kelly automobile drew alongside the van. (Decision, Appendix pp. 111, 112, 113, 115, 116). Considering the fact that the bus stop was located 93' east of the same reference point, the appellate

court's computations produced a conclusion that the Kelly automobile reached and passed the Nicholson van before it struck the King children. Such a conclusion is contrary to the undisputed testimony of both Mr. Kelly and Mrs. Nicholson to the effect that the Kelly automobile struck the King children and then passed the Nicholson van.

The court of appeal reversed the jury's findings and rendered a de novo judgment on the basis of its own new factual findings. The decision of the appellate court, a copy of which is attached in the Appendix, is cited as 485 So.2d 578 (La. App. 4 Cir. 1986). There being no right of appeal from this de novo judgment, Mr. and Mrs. Nicholson and USAA filed an application for writs to the Louisiana Supreme Court. A copy of the application is also contained in the Appendix. The Supreme Court's denial of the application is found at 488 So.2d 201 (La. 1986); a copy of the denial is also attached.

The essence of petitioner's submission that the Louisiana Courts' interpretation of their power violates appropriate due standards is that the Court of Appeal, in re-examining a jury's factual findings, went beyond the record of the case, made unsupported assumptions, and took improper judicial notice of an inaccurate and questionable scientific formula which was not in evidence (in effect becoming an expert witness not subject to cross-examination), and reversed a jury's findings of fact without a proper demonstration that the finding of fact was manifestly erroneous.[1] These issues were all brought

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1. The "manifestly erroneous" standard has been held to be an essential due process safeguard in the Louisiana scheme allowing appellate review of facts. *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972), affirmed in memorandum decisions, 409 U.S. 943, 93 S.Ct. 289, 34 L.Ed.2d 218 (1972) and 409 U.S. 1098, 93 S.Ct. 908, 34 L.Ed.2d 679 (1973).

before the Louisiana Supreme Court in assignments of error I, II and III of petitioner's petition for writ of certiorari or review, filed on April 7, 1986.

The actions of the Louisiana Court of Appeal which are complained of herein came as a surprise as the ruling of that court had nothing to do with the narrow issue before it: i.e., the instructions given to the jury. Because this action was done unexpectedly with no right to address the court, petitioners were prevented from raising the Constitutional issues earlier. *Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, 640, 61 L.Ed. 1163 (1917).

Likewise, because the Louisiana Supreme Court had always heeded the due process standards of the "manifest error" rule, *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973), *Arceneaux v. Domingue*, 355 So.2d 1330 (La. 1978), there was no need for petitioners to raise the issue in Federal Constitutional terms in their application for discretionary State review. The denial of the Louisiana Supreme Court review, effectively expanding the abilities of intermediate appellate courts to new unconstitutional plateaus, was in and of itself unexpected. Thus, to penalize petitioners for the language in which they raised these issues before the Louisiana Supreme Court would "leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come" before this Honorable Court. *Saunders v. Shaw*, supra.

ARGUMENT FOR WRIT

The unique nature of the law of Louisiana has for over 150 years created unusual constitutional problems not encountered nor envisioned in common law. In *Parsons v. Bedford*, 3 Pet. (28 U.S.) 433, 7 L.Ed. 732 (1830), Justice Mc'Lean in his dissenting opinion observed:

> "In the State of Louisiana the principles of the common law are not recognized, neither do the principles of the civil law of Rome furnish the basis of their jurisprudence. They have a system peculiar to themselves, adopted by their statutes, which embodies much of the civil law, some of the principles of the common law, and, in a few instances, the statutory provisions of other States. This system may be called the civil law of Louisiana, and is peculiar to that State. (28 U.S. p. 449).

One of these peculiarities is the right of the Louisiana appellate courts to review both facts and law. Louisiana Constitution art. 5, Sec. 10. This right to re-examine a jury's factual finding has created considerable controversy in the past 25 years. One of the most recent serious challenges, which was based on the argument that a litigant was effectively denied the "fundamental right" of a trial by jury, was rejected by a three judge court in *Melancon v. McKeithen*, 345 F.Supp. 1025 (E.D. La. 1972); affirmed in memorandum decisions, 409 U.S. 943, 93 S.Ct. 289, 34 L.Ed.2d 218 (1972) and 409 U.S. 1098, 93 S.Ct. 908, 34 L.Ed.2d 679 (1973).

The majority, through Judge Wisdom, found that the Seventh Amendment to the United States Constitution did not require jury trials in civil cases and did not prohibit a state appellate court from reviewing a jury's factual findings.

"Taking a pragmatic and federally sound approach to the issue, we hold that a jury trial in civil cases and the *absolute prohibition of judicial re-examination of jury findings* in civil cases are not so fundamental to the American system of justice to be required of state courts by due process." (emphasis added) 345 F.Supp. at 1027.

Judge Wisdom recognized the dangers associated with a re-examination of a jury's findings, but believed that the Louisiana courts would properly adhere to the "manifest error" rule as the Constitutional safeguard of due process. That safeguard is predicated on the principle that a jury's factual findings would not be reversed absent a showing of manifest error. "A civil jury trial in Louisiana, however, is more than an exercise in futility, for appellate courts will not disturb a jury's or a trial judge's verdict unless the findings of fact are 'manifestly erroneous.' " *Melancon v. McKeithen*, supra, p. 1028.

The majority's belief that Louisiana courts would faithfully adhere to the manifest error rule was not shared by the dissenting judge. Judge West, because of his experiences in Louisiana, recognized that only lip service would be given to this principle before an appellate court would substitute its own judgment for the jury's factual findings.

> "To conclude, as the majority of this Court does, that appellate review of facts under Louisiana law is based on the same 'manifest error' doctrine followed by the Federal Courts is simply to mis-state the facts . . . . It is not enough to quote, as the majority does, Judge Albert Tate (now a Justice of the Louisiana Supreme Court) to the effect that '[Louisiana] appellate courts must adhere to the settled jurisprudential rule * * * that a trial court's

> factual determinations should be accepted on appellate review in the absence of manifest error.' This may be, and probably is his opinion as to what the Louisiana appellate courts should be required to do. But the cold hard fact is that this is *not* what the Louisiana Appellate Courts do, nor is it what they are required by Louisiana law to do. 345 F.Supp. at 1058.
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> "The simple fact is that if the Judges of the Appellate Court in Louisiana disagree with the conclusions reached by the jury, they may, and often do, simply set the jury verdict aside without regard to whether or not manifest error was committed by the jury. In Louisiana the facts are passed upon a de novo basis by the Appellate Courts, based entirely upon a cold record, and without ever having had an opportunity to see and hear any witnesses." 345 F.Supp. at 1059.

The actions of the Appellate Court in this case not only prove the validity of Judge Wests' insights but extend far beyond even his harshest criticism. The Appellate Court in this case, in reversing the jury's factual findings, used complex formulas that were beyond the record of evidence, selected testimony which it considered more credible, made assumptions to suit its needs, and mathematically reconstructed an accident in such fashion that the result was contrary to one of the few uncontested facts.

The Appellate Court embarked upon this awesome journey by first considering factual issues that were not raised by the plaintiff/appellant, Nancy King as the basis for her appeal. (King Brief, Appendix p. A-71). No argument was presented

about time or distance calculations or about the testimony of defendant's expert.[1] It should be noted that the real issue was the credibility of the two drivers, Mrs. Nicholson and Mr. Kelly, that is, which of the two drivers' version of the accident was the more believable. An expert was used for the sole purpose of showing that Mrs. Nicholson's testimony regarding time and distance estimates was mathematically plausible.

However, the appellate court ignored the credibility issue and made an independent assessment of the precise path of travel of the Nicholson vehicle (the arc of its turn) and the location of the Nicholson van when it was passed by the Kelly automobile, despite Mrs. Nicholson's unimpeached testimony regarding its position adjacent to a sign. In reaching its conclusions the Court: used formulas for acceleration which were not in evidence; made assumptions which were not supported by the record; decided on the reliability and credibility of testimony; and took judicial notice of many factors. Using this astonishing approach, the Court reconstructed the accident in such a fashion that it determined that it occurred in a fashion which was not consistent with the testimony of either of the drivers on one of the most important factors in the case.[2]

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1 The brief of Mr. and Mrs. Nicholson and USAA contained an overall factual review because although Mr. and Mrs. Nicholson and USAA were the appellees, their brief was due on the same date as the brief of the appellant, Mrs. King. Because extensions of time were sought and granted, the brief of Mr. and Mrs. Nicholson and USAA, as appellees, was actually filed before the brief of Mrs. King, as the appellant. (Appendix p. 105). Thus, Mr. and Mrs. Nicholson and USAA prepared their brief by making an educated guess of the issues which would be raised by Mrs. King. After Mrs. King filed her brief, appellees filed a supplemental brief.

2 See Statement of the Case. The court concluded that the Kelly

Defendants-Appellees, Mr. and Mrs. Nicholson and USAA had no knowledge that the court was considering these issues at any time before the decision was rendered. There was, therefore, no opportunity to challenge the formulas, the computations, or the results or the computations by cross examination or other evidence, or to be heard on the assumption of facts or the assessment of credibility.

Once the judgment was rendered, although it was a de novo judgment based on a new factual finding, there was no right of appeal. The only means available for relief were afforded through a motion for rehearing to the same appellate court and an application for writs to the Louisiana Supreme Court (La. C.C.P. art 2166). The granting of either is discretionary with the respective courts.

Considering this background, the issue is not whether a judicial re-examination of a jury's findings violates principles fundamental to the American system of justice. That question has been resolved. The issue is whether an appellate court's re-examination of a jury finding by resort to factors beyond the record, without providing notice of intent to consider the factors and without affording an opportunity to contest the new factors, violates those principles essential for due process. Did the Appellate Court's application of the procedures pertaining to appellate re-examination of factual findings in this case stray far from " the settled course of judicial proceedings"[3] or from " the conception of due

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2 *con't* automobile passed the Nicholson van before it struct the two two children. The testimony of both Mr. Kelly and Mrs. Nicholson established that the Kelly automobile struck the two children before it reached and began to pass the Nicholson van.

3 *Walker v. Sauvinet*, 92 U.S. 90, 23 L.Ed. 678 (1876)

process of law."[4]

Although this Honorable Court has not decided the precise issue presented, the answer is obvious from *Melancon v. McKeithen*, supra, and *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937).

In the latter case, this Honorable Court, through Justice Cardozzo, expressed outrage at the actions of an Ohio State Commission, which rendered a decision based on a post hearing consideration of factors "not spread upon the record." 301 U.S. at 300. In the *Ohio Bell Telephone Company* case, the Commission's decision, which was affirmed by the Ohio State Appellate Courts, was struck down by this Honorable Court as a pretext for a proceeding and, therefore, violative of due process.

The Commission considered price indices in a publication which was not in evidence. Similarly, the Louisiana appellate court considered some formulas which were not in the record. The identity, authenticity, or validity of the formulas is still not known. Justice Cardozzo's observations regarding the Commission's actions are equally apropos to the appellate court's action in this case:

> "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record." 301 U.S. at 300.

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4 *Twining v. New Jersey*, 211 U.S. 78, 99, 29 S.Ct. 14, 20, 53 L.Ed. 79 (1908)

> "To fix the value of these components the Commission had recourse to statistics which it collected for itself. 'There was no suitable opportunity through evidence and argument . . . to challenge the result.' *West Ohio Gas Co. v. Public Utilities Commission* (No. 1), supra, p. 90." 301 U.S. at 306

> "The Commission, withholding from the record the evidential facts that it has gathered here and there, contends itself with saying that in gathering them it went to journals and tax lists, as if a Judge were to tell us, 'I looked at the statistics in the Library of Congress and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms." 301 U.S. at 303

In the present case, there was no notice that the Court would assume the role of an expert in accident reconstruction and make computations with formulas and facts that were not in the record. As a result, there was no opportunity to challenge the formulas used or the assumptions made by the appellate court. The right of cross examination to test and the right to present other evidence to refute the validity or the application of these formulas and facts were not available. A meaningful hearing of the issues was denied to the appellants. "The principle that a due process hearing includes the right to know what evidence is being used against one and the opportunity to rebut it, has been termed 'relatively immutable.' " *Robbins v. U.S.R.R. Retirement Board*, 594 F.2d 448, 452 (5th Cir. 1979). See also *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) and *Lutcher & Moore Lumber Co. v. Knight*, 217 U.S. 257, 30 S.Ct. 505, 54 L.Ed. 757 (1909).

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses. *Goldberg v. Kelly*, supra, at 397 U.S. 269. In *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), this Honorable Court noted that, except in unusual situations including national defense, traditional and well recognized standards of an open hearing should not be denied. One of the cited standards was set forth in 5 *Wigmore on Evidence* (3d ed. 1940) Sec. 1367. "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testimony by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination and a conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

Justice Douglas, in *Bowman Transportation v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447, (1976), reh. den. 420 U.S. 956, 95 S.Ct. 1340, 43 L.Ed.2d 433 (1974), observed:

> "A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the due process clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentaior."

The harm was compounded in this case because there was no right of appeal from the appellate court's de novo judgment based on its new factual findings and conclusions. In

Ohio Bell Telephone Co. v. Comm'n., supra, Justice Cardozzo, at 301 U.S. 302, noted:

> "When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here."

The concept that the appellate court could take judicial notice of a formula, the adding or subtracting of a second here or there, the length of a van, or traffic conditions is likewise without merit when all of these factors pertain to the contested central issue of fault.[5] "Courts take judicial notice of matters of common knowledge .... For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the war between the states ... but not of the extent of the depreciation at a given time and place .... The distinction is more important in cases whereas here the extent of the fluctuations is not collaterally involved but is the very point in issue. Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence ..... 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' Ibid. Cf. *Shapleigh v. Mier*, 299 U.S.

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5. **Judicial notice in Louisiana is not new to this Honorable Court. See *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961).**

468 .... Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial." *Ohio Bell Telephone Co. v. Comm'n.*, supra, 301 U.S. 301-302.

The fact that an appellate court rather than a trial court engaged in these actions is of no moment. "Requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224, 2 ALR 3d 1254, clarification den. 375 U.S. 950, 84 S.Ct. 439, 11 L.Ed.2d 312 (1963). Because a Louisiana Appellate Court has broad authority in re-examining a jury's factual findings, one cannot deny the applicability of the principle that the greater the power, the greater the need to scrutinize the actions of those who exercise that power in order to protect against its abuse. In considering the broad authority extended to the Ohio Regulatory Commission, Justice Cordozzo observed: "Regulatory Commissions have been invested with broad powers within this sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints ... Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely that the 'inexorable safeguard' ... of a fair and open hearing be maintained in its integrity ... The right to such a hearing is one of 'the rudiments of fairplay' ... assured to every litigant by the 14th Amendment as the minimal requirement ... There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay,

when that minimal requirement has been neglected or ignored." 301 U.S. at 304, 305.

In the *Ohio Bell Telephone Co.* case, the actions of the Commission were less arbitrary and less harmful than the actions of the appellate court in this case because: (1) the Commission was conducting an original hearing rather than a re-examination of a unanimous jury finding[6]; (2) the Commission actually saw and heard many witnesses rather than simply reviewed a cold record; and (3) there was a right of appeal available from the Commission's findings. In the present case, the appellate court did not reverse and remand the case for a new trial, but reversed and **rendered** a new judgment, substituting its own factual findings for those made by the jury. The appellate court rendered a judgment de novo on the basis of new factual findings. There is no right of appeal from such a judgment.

The actions of the appellate court not only afforded no notice to Mr. and Mrs. Nicholson and USAA of the issues to be considered, but deprived them of the right to challenge by cross-examination or presentation of other evidence those facts and formulas which were never introduced in evidence. Additionally, under Louisiana procedural law, Mr. and Mrs. Nicholson and USAA were deprived of any meaningful recourse from this action. While appellate re-examination of jury findings subject to appropriate due process safeguards is not per se unconstitutional, the unbridled actions of the appellate court in this case, and the potential future abuses of other appellate courts, are repugnant to all acceptable notions of fairness. Such a practice within a judicial proceeding

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6. In Louisiana, only nine of twelve jurors need concur for a verdict in a civil case. La. C.C.P. art 1797. In the present case, the jury's findings were unanimous.

resulting in the deprivation of property is clearly offensive to the fundamentals of the American system of justice and, therefore, violative of due process. A writ should issue to provide relief to Mr. and Mrs. Nicholson and USAA from a proceeding in which they were denied the fundamentals of a fair hearing and to ensure that in Louisiana, according to Justice Cardozzo, "... Hearings and appeals are to be more than empty forms." *Ohio Bell Telephone Co. v. Comm'n.*, supra, 301 U.S. at 303.

APPENDIX

APPENDIX

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* Although Nancy H. King described herself as an appellee in both her original and supplemental brief, she was in fact an appellant, having appealed the judgment and having sought a reversal of the judgment which had been rendered in favor of Mr. and Mrs. Nicholson and USAA.

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION " "

NO. 81-15706

DOCKET NO. 4

NANCY H. KING

v.

MANDY KELLY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and CUMIS INSURANCE SOCIETY, INC.

FILED in the Civil District Court
October 5, 1:35 PM '81
By _____ Deputy Clerk

PETITION FOR DAMAGES
DUE TO WRONGFUL DEATH

The petition of Nancy H. King, a person of the lawful age of majority and a resident of Orleans Parish, State of Louisiana, respectfully represents:

I.

The defendant, Mandy Kelly, is a person of the lawful age of majority and a resident of Orleans Parish, State of Louisiana; defendants State Farm Mutual Automobile Insurance Company is a foreign insurance company authorized to do and doing business in the State of Louisiana; and defendant Cumis Insurance Society, Inc. is a foreign insurance company

authorized to do and doing business in the State of Louisiana; and the defendants are justly and truly indebted unto your petition in the full and true sum of FOUR HUNDRED FIFTY-EIGHT THOUSAND SEVEN HUNDRED FIFTY EIGHT AND THIRTY CENTS ($458,758.30) jointly, severally, and in solido or as their respective liabilities may ultimately be determined for the following, to-wit:

II.

The petitioner, Nancy H. King, was the mother of two children, Duane Hastings King, born November 21, 1972, and Bronya Lee King, born June 20, 1969; petitioner, Nancy H. King was the legal guardian and tutrix of the children by virtue of the judgment of custody rendered on June 2, 1975 of the Civil District Court for the Parish of Orleans in the action captioned "Elton Jerome King vs. Nancy Hector wife of Elton Jerome King," No. 571-411.

III.

At all times pertinent hereto, the defendant, State Farm Mutual Automobile Insurance Company had in force and effect a policy of automobile liability insurance covering the defendant, Mandy Kelly and his automobile.

IV.

At all times pertinent hereto, the defendant, Cumis Insurance Society, Inc. had in force and effect a policy of automobile liability insurance covering the petitioner, Nancy H. King and providing uninsured motorist protection. As the limits of liability in the policy of automobile liability insurance carried by State Farm Mutual Automobile Insurance Company are not sufficient to cover the damages sustained by the petitioner, as a result of the matters complained of

herein, the defendant, Cumis Insurance Society, Inc. is liable to the petitioner for damages in excess of those limits.

V.

The defendant, Mandy Kelly, is the parent of and legally responsible for the acts of the minor, Anthony Kelly. On the date of the incident complained of herein, Anthony Kelly was fifteen years old and living with his parents in their family home.

VI.

On or about October 3, 1980, at approximately 7:50 a.m. the petitioner's two children, Duane and Bronya King were waiting for New Orleans Public Service bus at Chef Menteur Highway and Crowder Boulevard. The children were apparently safely situated on the sidewalk at the location of the bus stop.

VII.

On the aforesaid date and time, the minor, Anthony Kelly was operating a vehicle owned by the defendant, Mandy Kelly, in an eastward direction on Crowder Boulevard.

VIII.

Anthony Kelly was operating this vehicle at a rate excessively over the speed limits and lost control of the vehicle, which veered off the road and struck the two children.

IX.

As a result of the incident described above, both children died.

X.

Petitioner, Nancy H. King, was devoted to her two children. As a result of the untimely deaths of her children, she suffered extreme grief, mental anguish and distress; and as a result of their deaths, she sustained an irreparable loss and has been deprived of their companionship, security, love and affection.

XI.

The deaths of the children, Duane and Bronya King were caused solely by the fault of the minor, Anthony Kelly.

XII.

Petitioner avers that Anthony Kelly was negligent and at fault in the following non-exclusive list of particulars, among others which may be shown at the trial hereof, to wit:

a. Driving at an excessive rate of speed;

b. In losing control of his vehicle;

c. In failing to maintain a proper lookout;

d. In failing to see what he should have seen;

e. In failing to pay proper attention to his surroundings;

all in violation of the dictates of common sense, the laws of the State of Louisiana, and the Municipal Ordinances of the City of New Orleans, if any.

XIII.

Petitioner, Nancy H. King, incurred medical, hospital and funeral expenses as a result of this accident.

XIV.

Petitioner, Nancy H. King, itemizes her damages sustained as a result of the negligence of Anthony Kelly, and the injuries suffered by her children, as follows:

Deprivation of the companionship, security, love and affection of her children	$150,000.00
Grief, mental anguish and distress	$150,000.00
Physical pain and suffering of the children, prior to their deaths	$150,000.00
Funeral expenses	$ 3,486.60
Hospital and medical expenses	$ 5,271.70
TOTAL	$458,758.30

WHEREFORE, petitioner prays for judgment against the defendants, Mandy Kelly, State Farm Mutual Automobile Insurance Company, and Cumis Insurance Society, Inc., jointly, severally and in solido or as their respective liabilities may ultimately be determined in the full and true sum of FOUR HUNDRED FIFTY-EIGHT THOUSAND SEVEN HUNDRED FIFTY-EIGHT AND THIRTY CENTS ($458,758.30), together with all costs, interest from the date of judicial demand and all general and equitable relief to which they may be entitled.

Respectfully submitted:

WILLIAM F. WESSEL, PROF. LAW CORP.

BY /s/ Victoria L. Bartels
VICTORIA LENNOX BARTELS

Attorneys for Nancy H. King
127 Camp Street
New Orleans, Louisiana 70130
(504) 568-1112

PLEASE SERVE:

Mandy Kelly
4634 Read Boulevard
New Orleans, LA 70127
and
State Farm Mutual Automobile Insurance Company
through the Secretary of State
State of Louisiana
and
Cumis Insurance Society, Inc.
through the Secretary of State
State of Louisiana

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "I"

NANCY H. KING

VERSUS

MANDY KELLY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and CUMIS INSURANCE SOCIETY, INC.

NO. 81-15706

DOCKET NO. 4

FILED in the Civil District Court
November 16, 1981
By _____ DEPUTY CLERK

ANSWER

NOW INTO COURT, through undersigned counsel come Mandy Kelly and State Farm Mutual Automobile Insurance Company, sought to be made defendants who for answer to petition of plaintiff, do with respect represent:

I.

The allegations of Article I of the plaintiff's petition are denied except to admit status and capacity of respondents.

II.

The allegations of Articles II and IV of the plaintiff's petition are denied for lack of sufficient information to justify a belief.

III.

The allegations of Article III of the plaintiff's petition are denied except to admit that State Farm Mutual Automobile Insurance Company did issue a policy of insurance to Mandy Kelly and aver that said policy is the best evidence of its terms, provisions, applications, and limits of liability.

IV.

The allegations of Articles V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV of the plaintiff's petition are denied.

WHEREFORE, respondents, Mandy Kelly and State Farm Mutual Automobile Insurance Company, pray that this answer be deemed good and sufficient and after due proceedings had there be judgment rendered herein dismissing plaintiff's suit at her own costs and for all general and equitable relief.

/s/ C. GORDON JOHNSON, JR.
PORTEOUS, TOLEDANO, HAINKEL, & JOHNSON
704 Carondelet Street
New Orleans, LA 70130
Telephone No. 581-3838

641-8268-5

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

DIVISION "I"

NANCY H. KING

VS.

MANDY KELLY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND CUMIS INSURANCE SOCIETY, INC.

NO.: 81-15706

FILED in CIVIL DISTRICT COURT
ON Nov. 30, 1981-93041
BY: _____ DEPUTY CLERK

ANSWER AND THIRD-PARTY DEMAND

A. ANSWER

NOW INTO COURT, through undersigned counsel, comes CUMIS Insurance Society, Inc., sought to be made a defendant in the above numbered and entitled cause, and who for answer to the petition of plaintiff, does with respect represent:

I.

The allegations of Article I of the petition are denied except to admit status and capacity of respondent.

II.

The allegations of Article II of the petition are denied for lack of information sufficient to justify a belief therein.

III.

The allegations of Article III of the petition are admitted, upon information and belief.

IV.

The allegations of Article IV of the petition are denied except to admit that CUMIS Insurance Society, Inc. issued a policy of insurance wherein the named insured was Nancy H. King and aver that said policy is the best evidence of its terms, provisions, applications, and limits of liability.

V.

The allegations of Articles V, VI, VII, VIII, and IX of the petition are admitted, upon information and belief.

VI.

The allegations of Article X of the petition do not require a response of the part of respondent.

VII.

The allegations of Article XI of the petition are denied for lack of information sufficient to justify a belief therein.

VIII.

The allegations of Article XII of the petition are admitted, upon information and belief available to respondent at this time.

IX.

Respondent calls for strict proof of the allegations of Articles XIII and XIV of the petition.

WHEREFORE, respondent, CUMIS Insurance Society, Inc., prays that this answer be deemed good and sufficient, and after due proceedings had, that there be judgment rendered herein, dismissing plaintiff's suit, at her costs, and for all general and equitable relief.

B. THIRD-PARTY PETITION

And now assuming the position of third-party plaintiff, CUMIS Insurance Society, Inc., in order to protect its interests as they may appear, does bring this third-party petition:

1.

That third-party defendant is Mandy Kelly, a person of the full age of majority and a resident of the Parish of Orleans, State of Louisiana, who is the parent of and legally responsible for the acts of the minor Anthony Kelly, who, on the date of the incident complained of herein, was fifteen years old and living with his parents in their family home.

2.

That CUMIS Insurance Society, Inc. has been made a defendant in the above numbered and entitled lawsuit, it

being alleged that they were the uninsured motorist insurer of Nancy H. King and as a result of the accident subject of the original lawsuit they are responsible unto Nancy H. King for the negligent acts of the minor Anthony Kelly, for whom Mandy Kelly, as his father, is legally responsible, it being alleged that the limits of liability in the policy of automobile liability insurance carried by State Farm Mutual Automobile Insurance Company covering Mandy Kelly and his automobile are not sufficient to cover the damages allegedly sustained by the original plaintiff Nancy H. King. CUMIS Insurance Society, Inc. has denied these allegations, but demands hereby full indemnity from Mandy Kelly in the event they are responsible to pay unto Nancy H. King.

WHEREFORE, respondent/third-party plaintiff, CUMIS Insurance Society, Inc., prays that citation and service of process be made upon third-party defendant and that after due proceedings had, if there be judgment rendered in favor of original plaintiff, and against defendant/third-party plaintiff, CUMIS Insurance Society, Inc., that there be judgment over and in favor of defendant/third-party plaintiff, CUMIS Insurance Society, Inc., and against Mandy Kelly in the full amount of the original judgment plus interest and costs, and for all general and equitable relief.

/s/ HENRY LEON SARPY
HENRY LEON SARPY
PORTEOUS, TOLEDANO, HAINKEL & JOHNSON
704 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3838

PLEASE SERVE:

MANDY KELLY
4634 Read Boulevard
New Orleans, Louisiana 70127

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that I have on this 25th day of November, 1981, served a copy of the above and foregoing upon Victoria L. Bartels, Esq. and C. Gordon Johnson, Jr., Esq. by placing same in the U.S. Mail, properly addressed and postage prepaid.

/s/ HENRY LEON SARPY
HENRY LEON SARPY

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "I"

NO 81-15706

DOCKET NO. 4

NANCY H. KING

versus

MANDY KELLY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and CUMIS INSURANCE SOCIETY, INC.

FILED in the Civil District Court
July 29th, 1982

FILED _____
DEPUTY CLERK _____

AMENDED AND SUPPLEMENTAL PETITION

NOW INTO COURT, through undersigned counsel, comes the plaintiff Nancy H. King and makes the following amendments to the original Petition filed herein on her behalf.

1.

To add paragraph XV to read as follows:

XV.

Made additional party defendants herein are Linda Nicholson, wife of and Donald Nicholson, both persons of the lawful age of majority and residents of the Parish of Orleans, State of Louisiana, and USAA, a foreign insurance corporation licensed to do and doing business in the State of Louisiana; and the defendants Donald and Linda Nicholson and USAA are jointly, severally and in solido liable together with the original defendants Mandy Kelly, State Farm Mutual Automobile Insurance Company and Cumis Insurance Society, Inc. in the full and true sum of $458,758.30 all as itemized in the original Petition filed herein, for the following, to-wit:

2.

To add to the original Petition paragraph XVI to read as follows:

XVI.

At all times pertinent hereto, the defendant USAA had in full force and effect a policy of automobile liability insurance covering the defendants Donald and Linda Nicholson and the matters complained of herein.

3.

To add to the original Petition paragraph XVII to read as follows:

XVII.

On or about October 3, 1980 at approximately 7:50 a.m., the defendant Linda Nicholson was driving a 1970 blue and

whit Volkswagon bus, said vehicle being owned by the community existing between the defendant Linda Nicholson and her husband Donald Nicholson, ant at the aforesaid date and time, defendant Linda Nicholson was operating the vehicle on a community mission.

4.

To add to the original Petition paragraph XVIII to read as follows:

XVIII.

On the aforesaid date and time, as Linda Nicholson was driving her vehicle down Crowder Boulevard as it approached the intersection with Chef Menteur Highway, she turned left onto Chef Menteur Highway into the extreme right hand lane thereby crossing three lanes of traffic.

5.

To add to the original Petition paragraph XIX to read as follows:

XIX.

The defendant Linda Nicholson Pulled onto Chef Menteur Highway directly in front of the speeding vehicle driven by Anthony Kelly, the minor son of the defendant Mandy Kelly, forcing him to take evasive actions to avoid collision with her automobile and thereby contributing to the accident and the intended damages described in the original Petition filed herein on behalf of the petitioner Nancy King.

6.

To add paragraph XX to the original Petition to read as follows:

XX.

Petitioner avers that the defendant Linda Nicholson was negligent and at fault in the following non-exclusive list of particulars, among other which may be shown at the trial hereof, to-wit:

a) in making an improper left turn;

b) in failing to yield to the traffic on Chef Menteur Highway before turning left onto that thoroughfare;

c) in failing to maintain a proper lookout;

d) in failing to see what she should have seen; and

e) in failing to pay proper attention to her surroundings all in violation of the dictates of common sense, the laws of the State of Louisiana, and the Municipal Ordinances of the City of New Orleans, if any.

WHEREFORE petitioner reiterates by reference thereto each and every allegation contained in her original Petition and prays that the defendants be cited to appear and answer this Petition, that they be served with it together with a certified copy of the original Petition filed herein on behalf of Nancy King and that after due proceedings are had herein that there be judgment against the defendants Linda Nicholson, Donald Nicholson and USAA jointly, severally and in solido with the defendants Mandy Kelly, State Farm Mutual Automobile Insurance Company and Cumis Insurance

Society, Inc. in the full and true sum of $458,758.30 together with all costs, interest from the date of judicial demand until paid and for all general and equitable relief to which the petitioner may be entitled.

Respectfully submitted:

WILLIAM F. WESSEL, PROF. LAW CORPORATION

/s/ VICTORIA L. BARTELS
VICTORIA LENNOX BARTELS
127 Camp Street
New Orleans, Louisiana 70130
(504) 568-1112

PLEASE SERVE:

Donald Nicholson
8300 Curran Boulevard
New Orleans, Louisiana 70126

Linda Nicholson
8300 Curran Boulevard
New Orleans, Louisiana 70126

USAA, through the Secretary of State,
State of Louisiana,

Mandy Kelly and State Farm Mutual Automobile Insurance Company, through their attorney of record,
C. Gordon Johnson, Jr.
704 Carondelet Street
New Orleans, Louisiana 70130

Cumis Insurance Society, Inc.,
through its attorney of record,
David J Mitchell
704 Carondelet Street
New Orleans, Louisiana 70130

ORDER

Let the foregoing Amended and Supplemental Petition be filed. New Orleans, Louisiana, this 29th day of July, 1982.

/s/ TOM DALEY
TOM DALEY
Judge

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "I"

NO: 81-15706

DOCKET NO. 4

NANCY H. KING

VERSUS

MANDY KELLY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and CUMIS INSURANCE SOCIETY. INC.

FILED in CIVIL DISTRICT COURT
Aug. 10, 11:20 AM, 1982

FILED: _____
DEPUTY CLERK _____

ANSWER TO AMENDED AND SUPPLEMENTAL PETITION

NOW INTO COURT, through undersigned counsel, come Mandy C. Kelly, father of the minor Anthony D. Kelly, and State Farm Mutual Automobile Insurance Company, defendants herein, and who for answer to the amended and supplemental petition of plaintiff, do with respect represent:

I.

The allegations of Articles XV, XVI, XVII, XVIII, XIX, and XX of the amended and supplemental petition are denied.

WHEREFORE, respondents, Mandy C. Kelly, father of the minor Anthony D. Kelly, and State Farm Mutual Automobile Insurance Company, pray that this answer to the amended and supplemental petition be deemed good and sufficient, and after due proceedings had, that judgment be rendered herein, dismissing the amended and supplemental petition, at the costs of plaintiff, and for all general and equitable relief.

/s/ C. G. JOHNSON, JR.
C. GORDON JOHNSON, JR., ESQUIRE
PORTEOUS, TOLEDANO, HAINKEL & JOHNSON
704 Carondelet Street
New Orleans, LA 70130
Telephone No: 581-3838

CERTIFICATE OF SERVICE

I do hereby certify that I have on the 9th day of August, 1982, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ C.G. JOHNSON JR.
C. GORDON JOHNSON, JR., ESQUIRE

FILE NO. 641-8268

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "I"

NO. 81-15706

DOCKET NO. 4

NANCY H. KING

VERSUS

MANDY KELLY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND CUMIS INSURANCE SOCIETY, INC.

FILED in the CIVIL DISTRICT COURT
AUG. 27, 1:40 PM '82

FILED: _____
DEPUTY CLERK _____

ANSWER TO AMENDED AND SUPPLEMENTAL PETITION

NOW INTO COURT, through undersigned counsel, comes Cumis Insurance Society, Inc., defendant herein, and who for answers to the amended and supplemental petition of plaintiff, does with respect represent the following:

I.

The allegations of Articles XV, XVI, XVII, XVIII, XIX, and XX of the amended and supplemental petition are denied.

II.

Cumis Insurance Society, Inc. adopts and reavers all of its denials and/or allegations previously contained in their answer filed on November 30, 1981; and pleads same herein as if copied in extenso.

WHEREFORE, defendant, Cumis Insurance Society, Inc. prays that this answer to the amended and supplemental petition of the plaintiff be deemed good and sufficient, and that after due proceedings are had, there be judgment rendered herein, dismissing the amended and supplemental petition at the costs of plaintiff, and for all general and equitable relief.

/s/ DAVID J. MITCHELL
DAVID J. MITCHELL
PORTEOUS, TOLEDANO, HAINKEL
& JOHNSON
704 Carondelet Street
New Orleans, Louisiana 70130-3774
Telephone No. 581-3838

425-592

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "I"

NO. 81-15706

DOCKET NO. 4

NANCY H. KING

VERSUS

MANDY KELLY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND CUMIS INSURANCE SOCIETY, INC.

FILED in the CIVIL DISTRICT COURT
AUG 27, 1:41 PM '82

FILED: _____
DEPUTY CLERK _____

THIRD-PARTY DEMAND

NOW INTO COURT, through undersigned counsel, comes Cumis Insurance Society, Inc., assuming the position of third-party plaintiff in order to protect its interest as they may appear, does bring this third-party demand:

I.

That additional third-party defendants herein are the following:

Linda Nicholson, a person of the full age of majority and a resident and domicilliary of the Parish of Orleans, State of Louisiana;

USAA Insurance Company, a foreign insurance corporation authorized to do and doing business in the State of Louisiana, and at all times material herein, the insurer of Linda Nicholson for automobile liability.

II.

That Cumis Insurance Society, Inc. has been made a defendant in the above numbered and entitled cause, it being alleged that they were the uninsured/underinsured motorist insurer of Nancy H. King and as a result of the accident subject of the original lawsuit they are responsible unto Nancy H. King for the negligent acts of the minor, Anthony Kelly, for whom Mandy Kelly, as his father, is legally responsible, it being alleged that the limits of liability in the policy of automobile liability insurance carried by State Farm Mutual Automobile Insurance Company covering Mandy Kelly and his automobile are not sufficient to cover the damages allegedly sustained by the original plaintiff, Nancy H King. It is further anticipated that the liability limits in the policy of automobile liability insurance carried by USAA Insurance Company in favor of Linda Nicholson may not be sufficient to cover the damages allegedly sustained by the original plaintiff, Nancy H. King. Cumis Insurance Society, Inc. denies these allegations, but demands hereby full indemnity from Mandy Kelly, Linda Nicholson and USAA Insurance Company in the event they are responsible to pay unto Nancy H. King.

WHEREFORE, third-party plaintiff, Cumis Insurance Society, Inc. prays that citation and service of process be made upon third-party defendants and that after due pro-

ceedings are had, if there be judgment rendered in favor of the original plaintiff and against defendant/third-party plaintiff, Cumis Insurance Society, Inc., that there be judgment over and in favor of defendant/third-party plaintiff and against Mandy Kelly, Linda Nicholson and USAA Insurance Company, jointly, severally and in solido in the full amount of the original judgment plus interest and costs; and for all general and equitable relief.

/s/ DAVID J. MITCHELL
DAVID J. MITCHELL
PORTEOUS, TOLEDANO, HAINKEL & JOHNSON
704 Carondelet Street
New Orleans, Louisiana 70130-3774
Telephone No. 581-3838

PLEASE SERVE:

Mandy Kelly
4634 Read Boulevard
New Orleans, Louisiana 70127

Linda Nicholson
8300 Curran Boulevard
New Orleans, Louisiana 70126

USAA In surance Company
Through its agent for service of process,
The Secretary of State
State of Louisiana

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "I"

NO. 81-15706

DOCKET NO. 4

NANCY H. KING

VS.

MANDY KELLY, ET AL

FILED Sep. 17, 12:05 Pm '82
CIVIL DISTRICT COURT

FILED: _____
DEPUTY CLERK _____

ANSWER TO THIRD-PARTY DEMAND

NOW INTO COURT, through undersigned counsel, come Linda Nicholson and United Services Automobile Association, and in answer to the third-party demand of Cumis Insurance Society, Inc., respectfully show:

I.

The allegations in paragraph I are denied.

II.

The allegations in paragraph II are denied.

WHEREFORE, third-party defendants pray for judgment rejecting the demands of the third-party plaintiff.

SCHAFER & SCHAFER

BY: /s/ TIMOTHY G. SCHAFER
TIMOTHY G. SCHAFER
838 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 522-0203

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleadings has been served on counsel for all parties by depositing same in the United States Mails this 16th day of September, 1982

/s/ TIMOTHY G. SCHAFER
TIMOTHY G. SCHAFER

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "I"

NO. 81-15706

DOCKET NO. 4

NANCY H. KING

VS.

MANDY KELLY, ET AL

FILED Sep. 18, 12:07 AM '82
CIVIL DISTRICT COURT

FILED: _____
DEPUTY CLERK _____

ANSWER TO ORIGINAL AND AMENDED AND SUPPLEMENTAL PETITIONS

NOW INTO COURT, through undersigned counsel, come Linda Nicholson, Donald Nicholson, and United Services Automobile Association, made defendants, and in answer to the plaintiff's original, amended and supplemental petitions, respectfully show:

I.

The allegations in paragraph I are denied because the facts alleged are not known to the defendants.

II.

The allegations in paragraph II are denied because the facts alleged are not known to the defendants.

III.

The allegations in paragraph III are denied because the facts alleged are not known to the defendants.

IV.

The allegations in paragraph IV are denied because the facts alleged are not known to the defendants.

V.

The allegations in paragraph V are admitted.

VI.

The allegations in paragraph VI are denied because the facts alleged are not known to the defendants.

VII.

The allegations in paragraph VII are admitted.

VIII.

The allegations in paragraph VIII are admitted.

IX.

The allegations in paragraph IX are admitted.

X.

The allegations in paragraph X are denied because the facts alleged are not known to the defendants.

XI.

The allegations in paragraph XI are admitted.

XII.

The allegations in paragraph XII are admitted.

XIII.

The allegations in paragraph XIII are denied because the facts alleged are not known to the defendants.

XIV.

The allegations in paragraph XIV are denied.

XV.

The allegations in paragraph XV are denied.

XVI.

The allegations in paragraph XVI are denied, except that defendants admit that on October 3, 1980, there was in full force and effect a policy of automobile liability insurance, which was issued by United Services Automobile Association to Donald Nicholson, but defendants aver that said policy is the best evidence of its contents, including the bodily injury liability limits of $100,000 per person and $2000,000 per occurrence and, therefore, plead said policy

herein as if copied in extenso.

XVII.

The allegations in paragraph XVII are admitted.

XVIII.

The allegations in paragraph XVIII are admitted.

XIX.

The allegations in paragraph XIX are denied.

XX.

The allegations in paragraph XX are denied.

FURTHER ANSWERING the allegations of the plaintiff's petition, defendants respectfully represent:

XI.

The automobile-pedestrian accident, which is described in the plaintiff's petition, was not caused by nor due in anyway to any negligence on the part of Linda Nicholson.

XII.

Defendants desire and are entitled to a trial by jury.

WHEREFORE, defendants pray for judgment rejecting the plaintiff's demands.

SCHAFER & SCHAFER

BY: /s/ TIMOTHY G. SCHAFER
TIMOTHY G. SCHAFER
838 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 522-0203

ORDER

Let there be a trial by jury in the above-numbered and entitled action, conditioned upon defendants' depositing in the registry of the Court the sum of $192.00, cash, for each day that the Court estimates that the trial will last, which deposit must be made on or before the date of the trial and prior to the commencement of the trial.

NEW ORLEANS, LOUISIANA, this 20th day of September, 1982.

/s/ Melvin Blmas
JUDGE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleadings has been served on counsel for all parties by depositing same in the United States Mails this 16th day of September, 1982.

/s/ TIMOTHY G. SCHAFER
TIMOTHY G. SCHAFER

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "I"

NO: 81-15706

DOCKET NO. 4

NANCY H. KING

VERSUS

MANDY KELLY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and CUMIS INSURANCE SOCIETY, INC.

FILED Mar 4, 2:12 PM '83
CIVIL DISTRICT COURT

FILED: _____
DEPUTY CLERK _____

SUPPLEMENTAL AND AMENDING ANSWER

NOW INTO COURT, through undersigned counsel, come STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and MANDY C. KELLY, FATHER OF THE MINOR, ANTHONY D. KELLY, defendants herein, who wish to supplement and amend their answer originally filed herein as follows to-wit:

I.

That ANTHONY D. KELLY was placed in an emergency circumstance due to the operation of a vehicle by LINDA NICHOLSON in pulling in front of him causing him to attempt to avoid a collision resulting in this accident.

WHEREFORE, respondents, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and MANDY C. KELLY, FATHER OF THE MINOR, ANTHONY D. KELLY, pray that the supplemental and amending answer be filed herein and that after due proceedings had, that judgment be rendered herein, dismissing plaintiff's suit, at his costs, and for all general and equitable relief.

Respectfully submitted,

/s/ C. GORDON JOHNSON, JR., ESQUIRE
PORTEOUS, HAINKEL, JOHNSON & SARPY
704 Carondelet Street
New Orleans, La. 70130
Telephone No: (504) 581-3838

FILE NO: 641-8268

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "L"

NANCY H. KING, ET AL.

VERSUS

MANDY KELLY, ET AL.

NO. 81-15497
consolidated with
no. 81-15706

DOCKET NO. 4

JUDGMENT

Considering the verdict of the jury rendered herein this date, and the Court having considered the law and the evidence and the evidence being in favor of the plaintiff:

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of plaintiff, Nancy Carr, and against defendants, Mandy Kelly, State Farm Mutual Automobile Insurance Company, and Cumis Insurance Society, Inc., jointly, severally and in solido, in the full sum of $300,000.00 together with legal interest thereon from date of judicial demand until paid, and for all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, Mandy C. Kelly and State Farm Mutual Automobile Insurance Company, and against plaintiff, Elton J. King, dismissing his suit as to the said Mandy C. Kelly and State Farm Mutual Automobile Insurance Company at his costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of defendants, Linda Nicholson, Donald Nicholson, and United Services Automobile Association, and against plaintiff, Elton J. King dismissing his suit as to the said Linda Nicholson, Donald Nicholson and United Services Automobile Association, at his costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of third party defendants Linda Nicholson and United Services Automobile Association, and against third party plaintiff, Cumis Insurance Society, Inc., dismissing the third party petition of Cumis Insurance Society, Inc. as to the said Linda Nicholson and United Services Automobile Association.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, Linda Nicholson, Donald Nicholson and United Services Automobile Association, and against plaintiff, Nancy Carr, dismissing her suit as to the said Linda Nicholson, Donald Nicholson and United Services Automobile Association at her costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, State Farm Mutual Automobile Insurance Company and Cumis Insurance Society, Inc. are liable to the extent of their policy limits herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of third party plaintiff, Cumis Insurance Society, Inc. and against third party defendant, Mandy Kelly in the amount that Cumis Insurance Society, Inc. is cast in this judgment herein.

JUDGMENT READ, RENDERED AND SIGNED IN OPEN COURT THIS 16th DAY OF NOVEMBER, 1983.

/s/ JOSEPH P. DiROSA
JOSEPH P. DiROSA
Judge

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "L"

NANCY H. KING, ET AL

VERSUS

MANDY KELLY, ET AL

No. 81-15497 cw 81-15706

DOCKET NO. 4

FINDINGS OF THE JURY

This cause came on for trial on the 14th day of November, 1983 and continued through the 16th day of November, 1983.

PRESENT:

WILLIAM F. WESSEL VICTORIA LENNOX BARTELS	attorneys for Nancy H. King
IRVING J. WARSHAUER	attorney for Elton J. King
C. GORDON JOHNSON, JR.	attorney for State Farm Mutual Mandy C. Kelly

TIMOTHY G. SCHAFER MATTHEW COLLINS	attorneys for Linda & Donald Nicholson & U.S. Auto Ins.
DAVID J. MITCHELL	attorney for Cumis Ins. Co.

and the following jurors:

ANTHONY GARIBALDI	MWINDAJI KWELI
THELMA T. BUTLER	SARAH MILLER
MYRA H. S. ASHMORE	PRISCILLA A. COSTON
RONALD ELLOIE	ADOLPH GRIMES, JR.
HOWARD H. THOMPSON	RONA L. WOODS
CABRINI A. HUNTSBERRY	JOHN A. MARIANO

Alternate JIMMIE E. MITCHELL

When, after hearing the pleadings, evidence and argument of Counsel, the case having been submitted to the Jury and the charge of the Court having been delivered to them, the said Jury retired to deliberate.

Thereafter, the jury returned into court and through their Foreman tendered the following Answers to questions to the said Jury and verdict:

1. Was Anthony Kelly Negligent? Yes _x_ No ____
   if your answer is yes, then answer question No. 2.

   if your answer is no, skip question No. 2 and answer question No. 3.

2. Was Anthony Kelly's negligence a proximate cause of the accident? Yes x No ____

3. Was Linda Nicholson Negligent? Yes ____ No x
if your answer to question No. 3 is no, then skip question No. 4 and answer question No. 5.

4. Was Linda Nicholson's negligence a proximate cause of the accident? Yes ____ No x

5. What amount of damages do you award to Nancy Carr? $300,000.00

6. What amount of damages to you award to Elton King? -0-

DATE 11-16-83

/s/ JOHN A. MARIANO
Foreman

And the Court ordered the said jury to be polled and the said jury, after having been polled were found to stand as follows:

FOR THE VERDICT:

TWELVE

Thereupon, counsel for plaintiff moved the Court to make the verdict of the Jury the Judgment of the Court, and the Court ordered said verdict to be recorded and Judgment to be entered in accordance therewith.

New Orleans, Louisiana
November 16th. 1983

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "L"

NANCY H. KING, ET AL

VERSUS

MANDY KELLY, ET AL

No. 81-15497 c/w 81-15706

DOCKET NO. 4

FILED in the Civil District Court
November 29, 1983
By _____ Deputy Clerk

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND ALTERNATIVELY FOR A NEW TRIAL

NOW INTO COURT, comes Nancy H. Carr, and moves for a judgment notwithstanding the verdict in favor of United Services Automobile Association and Linda and Donald Nicholson, for the reason that said verdict of the jury finding Linda Nicholson not negligent and not a proximate cause of the death of the plaintiff's children, totally in disregard of the evidence and of the law on the subject.

WHEREFORE, plaintiff, Nancy H. Carr, prays that the defendant, United Services Automobile Association and Linda and Donald Nicholson show cause on the date and time fixed by this Court, why a judgment notwithstanding

the verdict in their favor should not be entered herein.

Alternatively, plaintiff, Nancy H. Carr, prays for a new trial against the defendants, Linda and Donald Nicholson and United Services Automobile Association for the same reason as outlined herein.

Judgment was signed by the Court on November 16, 1983 and Notice of the signed Judgment was mailed on November 23, 1983.

/s/ WILLIAM F. WESSEL
WILLIAM F. WESSEL
Attorney for Nancy H. Carr
127 Camp Street
New Orleans, LA 70130
(504) 568-1112

ORDER

Considering the foregoing,

IT IS ORDERED, that the defendants, Linda Nicholson, Donald Nicholson and United Services Automobile Association show cause on the 9th day of December, 1983, 9 AM, why a judgment notwithstanding the verdict or a new trial should not be entered herein.

New Orleans, Louisiana this 29th day of November, 1983.

/s/ JOSEPH T. KATZ
JOSEPH T. KATZ
Minute Clerk
Division "L"
BY ORDER OF THE COURT

PLEASE SERVE:

Linda and Donald Nicholson
and United Services Automobile Association
Through their Attorney of Record
Timothy Schafer
328 Lafayette Street
New Orleans, Louisiana

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 29th day of November, 1983.

/s/ WILLIAM F. WESSEL
WILLIAM F. WESSEL

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "L" (I)

NANCY H. KING

VERSUS

MANDY KELLY, ET AL

NO. 81-15706 C/W 81-15497

DOCKET NO. 4

FILED in the Civil District Court
December 14, 12:00 PM '83
By _____ Deputy Clerk

JUDGMENT

This cause came regularly for hearing on December 9, 1983, on a motion for judgment notwithstanding the verdict and alternatively for a new trial filed by plaintiff, Nancy H. King:

PRESENT: William F. Wessel, Attorney for Plaintiff, Nancy H. King

Matthew B. Collins, Jr., Attorney for Defendants, Linda Nicholson, Donald Nicholson and USAA;

After considering the pleadings and arguments of counsel, and for reasons orally assigned on the date of the hearing:

IT IS ORDERED, ADJUDGED AND DECREED that the motion for judgment notwithstanding the verdict and alternatively for new trial is denied.

JUDGMENT READ, RENDERED AND SIGNED in open Court, in New Orleans, Louisiana, this 14th day of December, 1983.

/s/ JOSEPH P. DiROSA
JOSEPH P. DiROSA
Judge

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "L"

NO. 81-15706 C/W 81-15497

DOCKET NO. 4

NANCY H. KING

VERSUS

MANDY KELLY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND CUMIS INSURANCE SOCIETY, INC.

FILED in the Civil District Court
January 20, 1984
By _____ Deputy Clerk

RECEIPT

I, NANCY H. KING, Plaintiff herein, hereby acknowledge receipt of the sum of:

THIRTY-TWO THOUSAND THREE HUNDRED SEVEN AND NO/100 ($32,307.00)

in full and final settlement of the judgment rendered in the above numbered and entitled cause against Cumis Insurance Society, Inc. only and hereby consent to the Clerk of Court

marking the docket "SATISFIED"; as to Cumis Insurance Society, Inc. only.

/s/ NANCY H. KING
NANCY H. KING

New Orleans, Louisiana

DATE: 1/15/84

WITNESS:

/s/ WILLIAM WESSEL
WILLIAM WESSEL

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "L"

NANCY H. KING

VERSUS

MANDY KELLY, ET AL

NO: 81-15706

DOCKET NO. 4

FILED in the Civil District Court
February 16, 1:31 PM '84
By _____ Deputy Clerk

STIPULATION OF PAYMENT
AND SATISFACTION OF JUDGMENT

KNOW ALL MEN BY THESE PRESENTS:

That I, WILLIAM F. WESSEL, attorney of record for/and NANCY H. KING (CARR), do hereby acknowledging receiving this day from STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, draft in payment and complete satisfaction and in full and final discharge of the judgment rendered herein on the 16th day of NOVEMBER, 1983, by the Honorable Joseph V. DiRosa of the Civil District Court, Parish of Orleans, State of Louisiana (which funds have been deposited into the Registry of the Court) and draft in the amount of $557.08 representing one-half of court costs in

this matter; and accordingly, I do hereby authorize, empower, and direct the Clerk of the Civil District Court, Parish of Orleans, State of Louisiana, to forthwith cancel and erase from the records of his office any inscription of said judgment as affecting STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, only, with plaintiff reserving her rights as against all other parties, and to show upon the record thereof full, final, and complete discharge of any and all judgment rendered in this matter as against STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

NEW ORLEANS, LOUISIANA, this 7th day of February, 1984.

/s/ William F. Wessel
William F. Wessel, Esq.
127 Camp Street
New Orleans, La. 70130
Telephone No: (504) 568-1112
Attorney for Plaintiff

/s/ Nancy H. King (Carr)
Nancy H. King (Carr)

FILE No: 641-8268

FOURTH CIRCUIT COURT OF APPEALS
STATE OF LOUISIANA

NUMBER: CA-3351

ELTON J. KING
PLAINTIFF/APPELLANT
VERSUS
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND MANDY KELLY, FATHER OF THE MINOR, ANTHONY KELLY, AND UNITED SERVICES AUTOMOBILE ASSOCIATION, AND DONALD AND LINDA NICHOLSON
DEFENDANTS/APPELLEES

consolidated with

NANCY H. KING
PLAINTIFF/APPELLANT
VERSUS
MANDY KELLY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND CUMIS INSURANCE SOCIETY, INC.
DEFENDANTS/APPELLEES

APPEAL FROM THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
HONORABLE JOSEPH P. DIROSA, JUDGE

ORIGINAL BRIEF OF APPELLEES, DONALD AND LINDA NICHOLSON, AND UNITED SERVICES AUTOMOBILE ASSOCIATION

SCHAFER & SCHAFER
TIMOTHY G. SCHAFER
Attorney for Defendants/Appellees, Donald and Linda Nicholson and United Services Automobile Association
328 Lafayette Street
New Orleans, Louisiana 70130
(504) 522-0011

FOURTH CIRCUIT COURT OF APPEALS
STATE OF LOUISIANA

NUMBER: CA-3351

ELTON J. KING
PLAINTIFF/APPELLANT
VERSUS
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND MANDY KELLY, FATHER OF THE MINOR, ANTHONY KELLY, AND UNITED SERVICES AUTOMOBILE ASSOCIATION, AND DONALD AND LINDA NICHOLSON
DEFENDANTS/APPELLEES
consolidated with
NANCY H. KING
PLAINTIFF/APPELLANT
VERSUS
MANDY KELLY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND CUMIS INSURANCE SOCIETY, INC.
DEFENDANTS/APPELLEES

APPEAL FROM THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
HONORABLE JOSEPH P. DIROSA, JUDGE

ORIGINAL BRIEF OF APPELLEES, DONALD AND LINDA NICHOLSON, AND UNITED SERVICES AUTOMOBILE ASSOCIATION

FACTS OF THE CASE

On October 3, 1980, at approximately 7:45 a.m., Bronya and Dwayne King waited at the intersection of Chef Menteur Highway and Crowder Boulevard for a City Bus to take them

to school. As they stood at the bus stop, a 1979 Cougar, which was being driven by Anthony Kelly, drove onto the sidewalk and struck the two children. Mr. Kelly claimed that he was forced off the road by a van which allegedly turned directly into his path. The Kelly car was travelling at such a fast rate of speed that the bodies of the children were propelled approximately one hundred and twenty-two feet from the point of impact. (R. Vol. IV, at 16, 17). Anthony Kelly, who was fifteen years of age, was driving his father's car which was insured by State Farm Mutual Insurance Company. Dwayne King who was seven years old at the time died instantaneously. Bronya, who was eleven years old at the time, died three hours later at Methodist Hospital. (R. Vol. III, at 10).

Immediately prior to the accident, Anthony Kelly had purchased some doughnuts at a Tastee Donut Shop on Chef Menteur Highway. He then drove an unidentified friend of his fathers to some location on Flake Street. Upon returning to Chef Menteur Highway, he proceeded eastbound in the right-hand lane of travel (there were three eastbound lanes). Although he stated that he was travelling at a speed of forty to forty-five miles per hour in a forty miles per hour zone, that was evidence to show a higher rate of speed. As he neared the intersection of Chef Menteur and Crowder, he had the doughnuts next to him and was listening to the radio. His attention to the roadway was questioned because he once stated that a black Chevrolet was in the center eastbound lane ahead of him, and at another time he stated that the same car was behind him.

Although Anthony Kelly stated that he had a clear view of the intersection of Chef Menteur Highway and Crowder Boulevard, his testimony differed as to when and where he first saw the Nicholson van and whether he continued to watch the van as it entered the eastbound lanes. He did admit

on one occasion that he saw the Nicholson van before it entered the median to his left and did not again notice it until it was ahead of him entirely in his lane of travel. (R. Vol. II, at 24). That testimony was consistent with one who had taken his eyes from the roadway, only to realize, upon again looking forward, that the situation had changed.

His testimony regarding the application of brakes was also contradictory. At one point in his testimony, he stated that he did not put on his brakes when he saw the van in front of him, (R. Vol. II, at 28). Later he testified that he applied his brakes when the van was approximately fifty feet away, but did not brake all the way because he wanted to avoid hitting the van and decided instead to swerve to the right and go all the way off the road, (R. Vol. II, at 27 and 66). Soon after the accident, he told Police Officer Philip Nicaud that he had applied his brakes hard, and had slid, before leaving the roadway. (R. Vol. II, at 66). According to Officer Nicaud, there were no slide nor skid marks at the scene of the accident, (R. Vol. IV, at 31).

After hitting the children, Anthony Kelly drove back onto Chef Menteur Highway and fled the scene. He returned to the scene only because his father, discovering the damage to his vehicle, contacted the police. Upon being charged Anthony Kelly pled guilty to negligent homicide and was placed on probation for three years, (R. Vol. III, at 207). Once he said that although he was without fault in the accident, he still pleaded guilty to negligent homicide, (R. Vol. III, at 208). However, later he admitted that he pled guilty to negligent homicide because he was guilty of negligent homicide, (R. Vol. III, at 210).

Mrs. Linda Nicholson was driving a 1970 Volkswagen Van, which was insured by United Services Automobile Association. As she approached the intersection of Crowder Boulevard

and Chef Menteur Highway, she was travelling in the left-hand lane of Crowder. Upon reaching the intersection, she brought her van to a complete stop, before safely crossing the westbound lanes of Chef Menteur Highway. As she entered the median, between the west and eastbound lanes of Chef Menteur, she brought her van to another stop for an east-bound car to pass. After it passed she noticed that the only other traffic approaching was approximately two or three blocks away. Since the approaching traffic was no hazard, she proceeded at a speed of ten to fifteen miles per hour to make a gradual turn into the right eastbound lane. (R. Vol. II, at 83, 95, 101, 103). After entering the east-bound lane of Chef Menteur Highway, and thereafter travelling approximately two or three van lengths, (R. Vol. II, at 84), she heard a noise, turned her head to the right, and saw a vehicle passing her on her right side up on the sidewalk, (R. Vol. II, at 85). After hearing the commotion and seeing the car on her right, she brought her van to a complete but non-emergency stop in the right-hand lane, (R. Vol. II, at 85). Her testimony was corroborated by Officer Nicaud who testified that Mr. Nicholson's van was completely in and straight in the right moving lane. (R. Vol. IV, at 16). The officer also testified that the right rear wheel of the van was eighty-eight feet, eight inches from the bus stop pole, (R. Vol. 14, at 18), which was located at the intersection of Crowder Boulevard and Chef Menteur Highway. Mrs. Marchand, an independent witness stated that the van was parked straight in the right-hand lane only, and that the van was not moved after the accident, (R. Vol. II, at 166, 167).

Linda Nicholson's testimony that when she entered the eastbound lanes, the only traffic approaching was approximately two or three blocks away, (obviously Anthony Kelly's car was one of them) was substantiated by the testimony given by Mr. Duaine Evans. Mr. Duaine Evans, a traffic engineer, who gave testimony as an expert witness, stated

that it would take the van approximately sixteen seconds to accelerate to fifteen miles per hour while travelling from the median of Chef Menteur to the van's location at the time of the impact. At impact, the van was adjacent to a sign which was one hundred and forty-nine feet past the van's entrance onto Chef Menteur Highway, (R. Vol. IV, at 77 and 24); that measurement was also confirmed by Officer Nicaud, (R. Vol. IV, at 24). Mr. Evans stated that the 1979 Cougar, proceeding at forty-five miles per hour, would have travelled one thousand twenty feet in sixteen seconds, (R. Vol. II, at 78). Thus, when the Nicholson van entered Chef Menteur Highway, the Kelly vehicle was at least one thousand and twenty feet away. According to Mr. Evans, if the Cougar had been going faster than forty-five miles per hour, which Anthony Kelly once admitted, then the Cougar would have been even further away than one thousand twenty feet when the van started its turn into Chef Menteur Highway, (R. Vol. IV, at 86). The Jury obviously believed that Mrs. Nicholson entered Chef Menteur Highway at a time when it was safe to do so and that the accident occurred because Anthony Kelly was driving his vehicle at an excessive rate of speed and was not devoting sufficient attention to the road ahead.

The parents of Bronya and Dwayne King, had been divorced since 1975, and had been legally separated since 1974. After the separation and divorce, their mother, Mrs. Nancy King Carr had custody of the children. Mr. King moved to Mobile, Alabama in 1977, and even though he was employed in Mobile, he only paid $75.00 in child support. Mr. King saw his children only once in the last two years of their life. His sincerity and interest was best exemplified by the fact that the photo album of his children, which he had brought to Court had been prepared after the childrens' death, (R. Vol. III, at 178). The Jury recognizing the depth of his emotions awarded him a sum which was consistent with that depth. They properly awarded him nothing.

ARGUMENT

I.

APPLICABLE CONSIDERATIONS ON REVIEW BY APPEALS COURT

There have been many cases cited regarding the rights and obligations of a motorist entering a through street from the median. A review of these cases leads to the inevitable conclusion that each case must be decided on its own facts. The ultimate test is whether the respective drivers acted reasonably under the existing circumstances. The determination of the reasonableness of the drivers rests squarely within the provence of the finder of fact. For this reason, this Honorable Court should not disturb a jury's decision which is based on reasonable factual findings. That rule is even more applicable where there is conflict in the testimony. The pertinent fact finder, herein the jury, is in the best position to evaluate all of the evidence. *Canter v. Koehring*, 283 So.2d 716, 724 (La. 1973); *Arceneaux v. Domingue*, 365 So.2d 1330, (La. 1979).

All of the cases which appellant cites either dealt with a situation where a person failed to yield the right of way, or with the duty and standard of care which is required of a left turning motorist. As appellant omits, however, travelling on a favored street does not relieve a motorist of his obligation to operate his vehicle in a prudent manner and to comply with all provisions of traffic regulations. *Robert v. Travelers Indemnity Company*, 196 So.2d 657 (La. App. 1st Cir. 1967); *Thomas v. Checker Cab Company*, 87 So.2d 605 (La. 1956); *Moss v. Travelers Indemnity Company*, 351 So.2d 290 (La. App. 3rd Cir. 1977), writ ref. 353 So.2d 1036 (La. 1978). Merely because Anthony Kelly was travelling on Chef Menteur Highway did not give him the privilege of going beyond the posted speed limit, being inattentive while eating

doughnuts or adjusting the radio, thereby causing an accident.

None of the cases cited by the appellant applies in our case because there was absolutely no credible evidence produced at trial which would prove that Linda Nicholson failed to yield the right of way to the traffic on Chef Menteur Highway; nor is there any credible evidence to show that she acted unreasonably when she made a left turn. Even if this Honorable Court was not required to give great weight to the Jury's findings of fact, it would affirm the exoneration of Mrs. Nicholson because the evidence clearly established that Linda Nicholson acted reasonably under the circumstances.

II.

THE NEGLIGENCE OF ANTHONY KELLY

Anthony Kelly's testimony was quite evasive, inconsistent and contradictory. The Jury obviously rejected that testimony. He initially stated that he first saw Mrs. Nicholson's van when it was stopped at Crowder Boulevard on the north side of the intersection of Chef menteur Highway. However, in his deposition and later in his testimony at trial, he stated that he had first seen the van as it was crossing the westbound lanes on Chef Menteur Highway, and that he did not see it again until it was entirely in his lane of travel and was only approximately fifty feet away. Considering these changes in his testimony, it would be realistic to conclude that he had seen the van when it was crossing into the median area but because of his inattentiveness while eating doughnuts or adjusting the radio, he did not notice the van again until he was immediately behind it.

Even after seeing the van completely in his lane of traffic, he did not apply his brakes in an attempt to try to avoid hitting the van. At one point in Anthony Kelly's testimony

he stated that he did apply his brakes when he saw the van in front of him, (R. Vol. II, at 28); he later stated that he had applied his brakes when the van was approximately fifty feet away, but did not brake all the way because he did not want to hit the van, and decided instead to drive all the way off the road and onto the sidewalk, (R. Vol. II, at 27 and 66). Soon after the accident, in a written statement given to Police Officer Philip Nicaud, he claimed that he had applied his brakes hard and had slid onto the sidewalk. However, Officer Nicaud testified that he looked for skid marks on the roadway in the area before the Kelly vehicle left the road and there were none. The fact that there were no slide or skid marks proves that Anthony Kelly did not apply his brakes when he saw the van in his lane of travel.

Anthony Kelly further admitted to Officer Nicaud that he was driving at a speed between forty to forty-five miles per hour at the time of the accident. The posted speed limit was forty miles per hour. Even assuming that he was driving at forty-one miles per hour, he was violating the law. Considering his path of travel and the distance that the bodies of the children were propelled, it was obvious that his speed was greater than that admitted. However, it is immaterial whether he exceeded the speed limit by only a few or by several miles per hour. A driver who operates a vehicle at a speed in excess of the speed limit is guilty of negligence. If a driver is unable ot avoid an accident because of his excessive speed, as was Anthony Kelly, then he is negligent and his negligence was a cause of the accident. La. R. S. 32:64; *Liverpool and London and Globe Insurance Company v. Taylor*, 193 So.2d 840 (La. App. 1967); *Camet v. Guillot*, 291 So.2d 438 (La. App. 1974); *Thayer v. State Farm Mutual Automobile Insurance Company*, 229 So.2d 767 (La. App. 1969); *Mock v. Savage*, 123 So.2d 806 (La. Appl 1960); *Fair v. State Farm Mutual Insurance Company*, 229 So.2d 767 (La. App. 1969);

Launey v. Smith, 192 So.2d 154 (La. App. 1966). Finally, Anthony Kelly admitted, that he pleaded guilty to a charge of negligent homicide in connection with this accident. Although he tried to assert that he was not guilty of negligence, he acknowledged that he was guilty of the criminal charge. The jury was clearly correct in finding that Anthony Kelly was negligent.

III.

THE REASONABLENESS OF LINDA NICHOLSON'S CONDUCT

Linda Nicholson, after crossing the westbound lanes of Chef Menteur Highway, stopped in the median area and looked to her right where she had a clear view of the eastbound traffic. After waiting for one small car to pass, and since the only other traffic approaching was approximately two or three blocks away, she proceeded to turn into the right lane (the slow lane) of Chef Menteur Highway. In *Barry v. Billac*, 250 So.2d 516, (La. App. 4th Cir. 1971) and *Cloney v. Smith*, 441 So.2d 342, (La. App. 5th Cir. 1983), it was held that a motorist who enters an intersection with a right-of-way street, may, upon observing the yield or stop sign and approaching traffic, then proceed across the favored street or turn into the favored street, assuming that vehicles approaching will observe the speed limit.

A motorist who desires to turn left on a city street, is not required to wait until there is no traffic in sight before attempting to turn. The motorist must simply act as a reasonably prudent driver. Mrs. Nicholson waited until all approaching traffic was over two blocks away before entering the eastbound traffic. She had the right to assume that the approaching vehicles were being driven in a proper manner and a proper rate of speed. Our jurisprudence provides that

if a left turning motorist was driving in a careful manner and an accident occurs because an approaching motorist was driving at an excessive rate of speed or was driving in a wreckless manner, which could not have been anticipated by the left turning motorist, then the left turning motorist cannot be found to have been at fault. *Barry v. Billac, infra; Cloney v. Smith, infra.*

Mr Duaine Evans, a traffic engineer, who gave testimony as an expert witness, stated that it would take the van approximately sixteen seconds to accelerate to fifteen miles per hour while travelling from the median of Chef Menteur Highway to the van's location at the time of the impact. At impact, the van was adjacent to a sign which was one Hundred forty-nine feet past the van's entrance onto Chef Menteur Highway. The one humdred forty-nine feet measurement was taken by Officer Nicaud and confirmed by Mr. Evans. According to Mr. Evans, the Kelly vehicle, proceeding at forty-five miles per hour, would have travelled one thousand twenty feet in sixteen seconds. Therefore, we can conclude that at the time the van started its left turn from the median area, the Cougar was at least one thousand twenty feet away from the van. According to Mr. Evans, if the Cougar had been going faster than forty-five miles per hour, which Anthony Kelly has admitted, then the Cougar would have been even further away from Mrs. Nicholson's van than one thousand twenty feet when the van started its turn into Chef Menteur Highway, (R. Vol. IV, at 76-86). These distances were entirely consistent with Mrs. Nicholson's testimony that approaching traffic was over two blocks away.

The facts elicited at the trial and supported by the expert witness, Mr. Evans, prove that Mrs. Nicholson's actions were totally reasonable. When Linda Nicholson stopped, looked to her right, Anthony Kelly's vehicle was approximately two or three blocks away. She had the right to assume

that the approaching vehicles would be travelling at a proper rate of speed, and in an attentive manner. Her entry was, therefore, quite reasonable under the circumstances. Therefore, the jury was correct in finding that Linda Nicholson was not negligent.

IV.

THE APPROPRIATE RECOVERY BY ELTON KING

Mrs. Nancy King Carr had the legal custody of the children since 1974. Mr. Elton King moved to Mobile, Alabama, in 1977, and even though he was employed in Mobile, Alabama, he only paid $75.00 in child support from 1977 up until the death of his children. Mr. King saw the children only once during the last two years of their life. He finally admitted at trial that the photo album he had brought to Court had been prepared after the childrens' death, (R. Vol. III, at 178).

The law does not attempt to place a value on life, only to compensate certain parties (such as parents of a deceased child) for their loss. Our jurisprudence has held that loss is determined by the amount of love, affection, companionship, and closeness between the parents and the child. *Wright v. Romano*, 279 So.2d 735 (La. App. 1973); *Joyner v. Williams*, 35 So.2d 812 (La. App. 1948); *Palmer v. American General Insurance Co.*, 126 So.2d 771 (La. App. 1960). The existence of love, affection, and companionship between the children and their parents can only be measured by actions and other outward or physical manifestations. More consideration must be given to the actions of the parents than the mere words of the parents. See, *Vonner v. State Department of Public Welfare*, 258 So.2d 93 (La. App. 1972). Based on the aforementioned actions of Mr. King, inaction would be a better description, there was no manifest error by the jury's award.

V.

THE INSTRUCTIONS TO THE JURY WERE CORRECT

The plaintiff contends that the Court's instructions of law were incorrect, and that the Judge should have instructed the jury on the duty of the left-turning motorist.

The Judge made the following charge to the jury, which would encompass the plaintiff's contention of error:

> "When an innocent third party is injured in an automobile accident, there is a presumption of negligence on the part of the drivers and each has a negligence. Negligence is a doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's property. Ordinary care is the care which reasonably prudent persons exercise in the management of their own affairs in order to avoid injury to themselves or their property, or other persons or property of others. Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in the given case, the conduct in question must be viewed in light of all the surrounding circumstances as shown by the evidence in the case. The mere fact that an accident happened, standing alone, does not unless otherwise stated permit the jury to draw the inference that the accident was caused by anyone's negligence. An injury or

> damage is proximately caused by an act or failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage and that the injury or damage was either a direct result or a reasonably probable consequent of the act or omission. This does not mean that the law recognizes only one proximate cause of an injury or damage consisting of only one fact or thing, or the conduct of only one person." (P. 122-125)

A Trial Judge is not required to instruct a jury on all of the law available on the subject matter, but is required to instruct the jury on all of the law that is pertinent to the case at hand. *Aguillard v. Lake Charles Stevedores, Inc.*, 284 So.2d 124, La. App. 1973. Thus, the failure of the Judge to give this charge is not an error. While a Trial Judge has the obligation to instruct a jury on the law, a Trial Judge is not obligated to couch those instructions in the language sought by counsel. As long as the instructions given by the Trial Judge are clear and reflect an adequate statement of the law, there exists no error simply because a Judge uses his language rather than counsel's. *Alexander v. Alton Ochsner Medical Foundation*, 276 So.2d 794, La. App. 1973. Furthermore, a Trial Judge is not required to give charges that consist of a restatement of the law in terms that each counsel may feel is most favorable to the case, particularly when the subject matter is covered elsewhere in the general charge. *Haynes v. Baton Rouge General Hospital*, 298 So.2d 149, La. App. 1974; *Smith v. Quality Transport, Inc.*, 346 So.2d 787, La. App. 1977; and *Darbonne v. Southern Farm Bureau Casualty Insurance Company*, 300 So.2d 506, La. App. 1974.

In this particular case, Judge DiRosa's instructions covered each central element of the case and, therefore, were proper. His refusal to elaborate on certain points as requested by the plaintiff and on other points as requested by the defendants, does not constitute error.

CONCLUSION

In conclusion, it is obvious that Appellant and Appellees have different versions and interpretations of the facts presented at trial. These discrepancies represent the exact reason why appellate review is so stringent. A jury of twelve people heard all the facts, were charged to decide the case independently and without bias, and were unanimous in their verdict that Anthony Kelly was completely at fault, and that Linda Nicholson was not at fault. As applicable here, as our Supreme Court stated in *Canter v. Koehring*, 283 So.2d 716, 724 (La. 1973);

> "Where there is evidence for the (jury) which, upon its reasonable evaluation of credibility, furnishes a reasonable factual basis for its finding, on review the the reviewing court in the absence of manifest error. Stated another way, the reviewing court must give great weight to the factual conclusions of the trier of fact; where there is a conflict in the testimony, reasonable evaluation of credibility and reasonable inferences of fact should not be disturbed on review even though the reviewing court may feel that its own evaluations and inferences are as reasonable. The reason for this well-settled principle of review is based upon not only the jury's better capacity to evaluate live witnesses . . ., but also upon the proper allocations of the functions of the jury and the reviewing court".

There was evidence before the jury which, upon its reasonable evaluation of credibility, furnished a reasonable factual basis for the Jury's finding. Therefore this Honorable Court of Appeals should not disturb this finding, because there was no manifest error made when the Jury found that Mrs. Nicholson was not negligent. The Jury's finding is fully supported by the evidence and should be maintained.

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COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

NO. CA 3351

ELTON J. KING,
PLAINTIFF/APPELLANT

VERSUS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and MANDY KELLY, Father of the Minor, ANTHONY KELLY, and UNITED SERVICES AUTOMOBILE ASSOCIATION, and DONALD and LINDA NICHOLSON,
DEFENDANTS/APPELLEES

ORIGINAL BRIEF ON BEHALF OF NANCY KING, PLAINTIFF/APPELLEE

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COURT OF APPEAL, FOURTH CIRCUIT

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DEFENDANTS/APPELLEES

I

SYLLABUS

A.) An integral part of the right to trial by jury is the right to have all of the evidence weighed in light of proper jury instructions, which fairly and reasonably point out the issues presented by the pleadings and the evidence, and which provide the correct principles of law for the jury to consider in application thereto. *Gonzales v. Xerox Corp.*, 320 So.2d 163 (La. 1975); *Reed v. Gulf Insurance Co.*, 436 So.2d 580 (La. App. 4th Cir. 1983); and, *Bond v. Jack*, 387 So.2d 613 (La. App. 3rd Cir. 1980).

B.) Whenever the charge read to the jury does not address crucial factual issues raised by the evidence, such an omission is manifest error. *Gonzales v. Xerox Corp.*, *supra*; and, *Reed v.*

Gulf Insurance Co., supra.

C.) The driver of a vehicle intending to turn left bears the responsibility of yielding the right of way to vehicles approaching from the opposite direction, which are so close as to constitute an immediate hazard. He may not execute his left turn until the movement can be made with reasonable safety. LSA - R.S. 32:104, 122; *Ruthardt v. Tennant*, 215 So.2d 805, 252 La. 1041 (1968); *Gibson v. Fisher*, 401 So.2d 565 (La. App. 3rd Cir. 1981); *Morrison v. Edwards*, 323 So.2d 838 (La. App. 4th Cir. 1976); and, *Casimere v. Ryder Truck Rentals, Inc.*, 324 So.2d 855 (La. App. 4th Cir. 1976).

D.) The motorist attempting such a left turn is required to exercise a very high degree of care and should not attempt to left turn unless he has taken every reasonable precaution to insure that the turn can be made without endangering approaching motorists. *Gibson v. Fisher, supra, Casimere v. Ryder Truck Rentals, Inc., supra*; *Bourque v. Haycock*, 243 So.2d 108 (La. App. 3rd Cir. 1971); and, *Beasley v. Pate*, 180 So.2d 219 (La. App. 2nd Cir. 1965).

E.) When such a left turning motorist is involved in a collision, she is burdened with the presumption of liability for the accident and must show that she was free from negligence to avoid the imposition of liability. *Gibson v. Fisher, supra.*

F.) A motorist entering the highway from a private driveway or secondary road, has the primary duty of avoiding a collision with a vehicle using a main highway, and such driver may not enter the highway until it becomes apparent to him, or should become apparent to a reasonably prudent person under the circumstances, that his entrance to the highway can be made in safety. LSA - R.S. 32:124; *Bell v. State Farm*

Mutual Automobile Insurance Co., 216 So.2d 872 (La. App. 2nd Cir. 1968); *Rough v. Landry*, 328 So.2d 768 (La. App. 1st Cir. 1976); *Burge v. Doty*, 279 So.2d 273 (La. App. 2nd Cir. 1973); *Crandall v. Enterprise Electric, Inc.*, 277 So.2d 247 (La. App. 4th Cir. 1973); *Danos v. Forsythe*, 205 So.2d 821 (La. App. 4th Cir. 1968); and, *Steiner v. Employers Liability Assurance Corp.*, 182 So.2d 345 (La. App. 3rd Cir. 1966).

G.) In addition, the driver on the inferior street is charged with the duty of maintaining a proper look out and is held to have seen that which he should have seen by the exercise of reasonable care. *Burge v. Doty*, *supra*; *Shephard v. Checker Cab Co.*, 230 So.2d 343 (La. App. 4th Cir. 1970); and, *Landry v. State Farm Mutual Automobile Assurance Co.*, 215 So.2d 226 (La. App. 3rd Cir. 1968).

H.) The driver who stops in obedience to a traffic sign discharges only part of the duty required of him. He must also refrain from driving into the intersection until he has made certain that it is safe to do so. He is also required to see approaching vehicles, which he should see, on the favored street and to refrain from crossing until it is safe to do so. Louisiana Revised Statutes 32:123; *Danos v. Forsythe*, *supra*; *Steiner v. Employers Liability Assurance Corp.*, *supra*.

I.) Violation of a safety statute is negligence *per se*, and this negligence is actionable if it was a legal cause of the collision. *Dixie Drive It Yourself System v. American Beverage Co.*, 137 So.2d 298, 242 La. 471 (1962); and, *Ruthardt v. Tennant*, *supra*.

J.) Conduct is a cause of injury to another if it was a substantial factor in bringing about that injury. *Dixie Drive It Yourself System v. American Beverage Co.*, *supra*.

K.) Where erroneous charges precluded the jury from reaching a verdict in accordance with the law and facts, the Court of Appeal should render a judgment on the record before it. *Gonzales v. Xerox Corp.*, *supra*; and, *Bond v. Jack*, *supra*.

L.) When innocent third parties are injured in an automobile accident which has been caused by one of two drivers or possibly by the joint negligence of both, there is a presumption of negligence on the part of both of the drivers. Each driver bears the burden of proving himself or herself free from negligence. *Veals v. Manis*, 437 So.2d 359 (La. App. 4th Cir., 1983); and, *Poche v. Frazier*, 232 So.2d 851 (La. App. 4th Cir., 1970).

II

ASSIGNMENT OF ERROR

The failure of the trial court to include in its charge to the jury any instructions bearing upon the central issues of fact relating to the allegations of negligence on the part of defendant, Linda Nicholson, and to her insurer, U.S.A.A. was manifestly erroneous and requires reversal of the judgment below.

III

ARGUMENT

A.) The Inadequacy of the Jury Charge Resulted in Manifest Error and the Inability of the Jury to Render a Verdict Based on the Law and Facts.

It is clear that an essential component part of the right to a trial by jury is the right to have the jury instructed regarding legal principles applicable to every significant issue of fact fairly raised by the pleadings and the evidence.

> "Parties to litigation have the right to have all the evidence weighed in light of the proper jury instructions which fairly and reasonably point out the issues presented by the pleadings and the evidence, and which provide the correct principles of law for the jury to consider in application thereto . . . While the trial court is not required to give the precise jury instructions submitted by the parties, the court must give instructions which properly reflect the law applicable in light of the pleadings and the facts in each particular case . . . The trial court must give the proper charge on all facets of the law involved in a case . . . The trial court has clearly failed to provide all of the instructions of the law required in this case and we find the submission manifestly erroneous . . . If the trial court gives confusing, misleading instructions or omits an applicable essential legal principle, such instructions do not adequately set forth the law and constitute reversible error." (Citations omitted)

Reed v. Gulf Insurance Co., 436 So.2d 580, 584 (La. App. 4th Cir. 1983). See also, *Gonzales v. Xerox Corp.*, 320 So.2d 163 (La. App. 1975); and, *Bond v. Jack*, 387 So.2d 613 (La. App. 3rd Cir. 1980).

At the trial on the merits, the essential issue presented by the testimony and the evidence with respect to the liability of the defendants, Linda Nicholson and her insurer, U.S.A.A., was whether or not Linda Nicholson had breached her duty of care in making a left-hand turn from a secondary road controlled by a stop sign onto a favored thoroughfare.

All of the evidence, including Ms. Nicholson's own testimony, shows that immediately prior to this accident, Ms. Nicholson was traveling in the left-hand lane of traffic on Crowder Boulevard. (Testimony of Linda Nicholson, November 14, 1983, Record Vol. II, p. 83.) She approached the intersection of that street with Chef Menteur Highway. Traffic entering Chef Menteur Highway from Crowder Boulevard is controlled by a stop sign. Ms. Nicholson testified she stopped at the stop sign, crossed the west bound three lanes of traffic on Chef Menteur Highway, stopped in the neutral ground area, and then turned left crossing all three lanes of easterly traffic on Chef Menteur Highway, ending in the right hand lane of traffic. *Ibid.*, at pp. 83-84. Before she could proceed more than two van lengths distance in the right hand lane, she heard the commotion on her right, turned and saw the Cougar automobile being driven by Anthony Kelly, passing her on her right. *Ibid.*, at pp. 84-85. The Cougar automobile struck the two children of Mrs. Nancy King and re-entered the highway in front of Linda Nicholson.

In connection with this evidence, the trial court was presented with a number of special jury instructions, requested by various of the parties, regarding the obligations of left turning motorists; motorists approaching an intersection

controlled by a stop sign; and motorists entering a favored highway from a secondary road. Six special instructions, numbers 9 - 15, were filed on behalf of plaintiff, Elton King, and adopted on behalf of plaintiff, Nancy King. (Record, Vol. I. See also, Transcript of Trial, November 16, 1983, Record Vol. IV, pp. 129-130.) Five special instructions, numbers 8 - 13, were presented to the Court on behalf of Cumis Insurance Society, the carrier of Mrs. King's uninsured motorist's coverage. (Record, Vol. V; Transcript of Trial, November 16, 1983, Record Vol. IV, p. 134.)

While all of the issues covered by these instructions were in fact fairly raised by the evidence and testimony, the trial court completely refused to read any instructions bearing upon the legal principles applicable to Ms. Nicholson's conduct. The jury was given absolutely no standards by which to measure that conduct and determine whether or not it had been substandard in any respect, and therefore, whether or not Ms. Nicholson and her insurer were liable to the plaintiff, Nancy King, for the deaths of her two minor children.

In contrast, the Judge did include in his charge, the following special instructions with respect to one of the issues raised by the evidence in connection with Anthony Kelly's conduct.

> "A driver who operates a vehicle at a speed in excess of the speed limit is guilty of negligence. It is immaterial whether he exceeds the limit by only a few or by several miles an hour. If a driver is unable to avoid an accident because of his excessive speed then the driver is negligent and his negligence was a contributing cause of the accident." (Transcript of Trial, November 16, 1983, Record Vol. IV, p. 124.)

In light of such a strong charge on exceeding the speed limit and the absence of any charge whatsoever on the obligations of a left-turning motorist, a motorist approaching an intersection controlled by a stop sign or a motorist entering a favored thoroughfare from a secondary road, the verdict of the jury, finding negligence on the part of Anthony Kelly but none on the part of Linda Nicholson, was a foregone conclusion.

The Louisiana Supreme Court decision in *Gonzales v. Xerox Corp.*, *supra*, requires that wherever an erroneous charge given by the trial court results in an inability on the part of the jury to render a verdict based upon the law and the evidence, it is the obligation of the Court of Appeals to reverse and render judgment based upon the record before it. Therefore, appellant, Nancy King, includes hereinafter a discussion of the applicable law and an analysis of the evidence.

B.) Applicable Law.

The law regarding the obligations of a motorist in a situation similar to that in which Linda Nicholson found herself on October 3, 1980, is well settled. Title 32 of the Louisiana Revised Statutes, "Traffic Regulations", contains the following applicable provisions:

> ***Section 101, "Required Position and Method of Turning at Intersections"***
>
> . . . (3) "Left Turns on Other Than Two-Way Roads"
>
> At any intersection where traffic is restricted to one direction on one or more of the roadways, the driver of a vehicle intending to turn left at any

such intersection shall approach the intersection *in the extreme left-hand lane lawfully available to traffic* moving in the direction of travel of such vehicle and after entering the intersection the left turn shall be made so as to *leave the intersection, in the safest lane lawfully available to traffic moving in such direction upon the roadway being entered . . .*

Section 104, Turning Movements and Required Signals

A. No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in R.S. 32:101, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety . . .

Section 122. Vehicle Turning Left at Intersection

The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to all vehicles approaching from the opposite direction which are within the intersection or so close thereto as to constitute an immediate hazard.

Section 123. Stop Signs and Yield Signs

A. Preferential right of way at an intersection may be indicated by stop signs or yield signs.

B. Except when directed to proceed by a police officer or traffic-control signal, every driver and operator of a vehicle approaching a stop intersection indicated by a stop sign shall stop before entering the cross walk on the near side at a clearly marked stop line, but if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After having stopped, the driver shall yield the right of way to all vehicles which have entered the intersection from another highway or which are approaching so closely on said highway as to constitute an immediate hazard . . .

Section 124. Vehicle Entering Highway From Private Road, Driveway, Alley or Building

The driver of a vehicle about to enter or cross a highway from a private road, driveway, alley or building, shall stop such vehicle immediately prior to driving onto a sidewalk or onto a sidewalk or onto the sidewalk area extending across any alleyway or driveway, and shall yield the right of way to any pedestrian as may be necessary to avoid collision, and shall yield the right of way to all ap-

> proaching vehicles so close as to constitute an immediate hazard.

The jurisprudence which has interpreted these safety statutes is also clear. Many cases have dealt with the obligations of the "left-turning motorists" as set forth in LSA-R.S. 32:101 (3), 104(A) and 122.

> The driver of a vehicle intending to turn left bears the responsibility of yielding the right-of-way to vehicles approaching from the opposite direction which are so close as to constitute an immediate hazard. LSA-R.S. 32: 122. Our courts have consistently held that a motorist attempting a left turn is required to exercise a very high degree of care. He should not attempt the left turn unless he has taken every reasonable precaution to insure that the turn can be made without endangering approaching motorists. *Casimere v. Ryder Truck Rental, Inc.*, 324 So.2d 855 (La. App. 4th Cir. 1975), writs den., 329 So.2d 453 (La. 1976); *Bourque v. Haycock*, 243 So.2d 108 (La. App. 3rd Cir. 1971); *Beasley v. Pate*, 180 So.2d 219 (La. App. 2nd Cir. 1965).
>
> Such a left turning motorist, when involved in a collision, is burdened with a presumption of liability for the accident. He must show he was free from negligence to avoid the imposition of liability. *Dunn v. Snyder*, 388 So.2d 450 (La. App. 2nd Cir. 1980); *Bennett v. U.S. Fid. & Guar. Co.*, 373 So.2d 1362 (La. App. 1st Cir. 1979), writ den., 376 So.2d 1269 (La. 1979); *Washington Fire & Marine Ins. Co. v. Firemen's Ins. Co.*, 232 La. 379, 94 So.2d 295 (1957).

Gibson v. Fisher, 401 So.2d 565, 566 (La. App. 3rd Cir. 1981). See also, *Casimere v. Ryder Truck Rental, Inc.*, 324 So.2d 855 (La. App. 4th Cir., 1976); *Morrison v. Edwards*, 323 So.2d 838 (La. App. 4th Cir., 1975); and, *Martin v. Weaver*, 191 So.2d 744 (La. App. 2nd Cir., 1967).

The degree of care required of a left turning motorist is even further increased where, as here, the motorist is attempting to turn unto "a much travelled street".

> Aside from any statutory regulation, however, the courts of this state have established rules which clearly define the requirement that a motorist on a much travelled street, like this one, who desires to make a left turn across the street, must be *particularly careful* and on the alert for cars meeting or overtaking his, and must not make the turn *until he is sure* it can be negotiated in safety. *Payne v. Prestridge*, 16 La. App. 479, 133 So. 512 (1931). The motorist making a left turn across the path of oncoming traffic between intersections has been required, in some applications of the rule, to use *extraordinary precautions*, as the motorist coming from the opposite direction on his own side of the road is not required to anticipate a sudden turn into a driveway. *Shirley v. Caldwell Bros. & Hart*, 183 So. 581 (La. App. 1938). Courts have ruled that the *burden rests heavily* on the motorist who desires to make a left turn to explain how the accident occurred and to show that he was free from negligence. *Jacobs v. State Farm Mutual Automobile Ins. Co.*, 191 So.2d 908 (La. App. 1966). A number of cases have

> recognized that one of the most dangerous maneuvers on a highway is the left turn, and, particularly, where it is attempted in the face of oncoming traffic. *Washington Fire & Marine Ins. Co. v. Firemen's Ins. Co.*, 232 La. 379, 94 So.2d 295 (1957); *Kugler v. Castjohn*, 201 So.2d 9 (La. App. 1967). (Emphasis supplied)

Ruthardt v. Tennant, 215 So.2d 805, 252 La. 1041 (1968).

When the maneuver attempted by the motorist is at an intersection controlled by a stop sign or yield sign, the obligation of the motorist is not discharged by simply stopping or slowing down for the sign.

> It is the well-settled jurisprudence of this State that a motorist approaching a stop sign at an intersection has two legal duties: first, he must bring his vehicle to a complete stop; and second, he must not undertake to traverse the intersection until he has sufficient time and distance to safely do so without causing damage to approaching vehicles on the favored thoroughfare. LSA-R.S. 32:123; *Shephard v. Checker Cab Company*, 230 So.2d 343 (La. App. 4th Cir. 1970); *Landry v. State Farm Mutual Automobile Insurance Company*, 215 So.2d 226 (La. App. 3d Cir. 1968); *American Road Insurance Company v. Irby*, 203 So.2d 427 (La. App. 2d Cir. 1967).

Crandall v. Enterprise Electric, Inc., 277 So.2d 247 (La. App. 4th Cir., 1973).

> In addition, the driver on the inferior street is charged with a duty of maintaining a proper lookout and is held to have seen that which he should have seen by the exercise of reasonable care. *Shephard v. Checker Cab Co.*, 230 So.2d 343 (La. App. 4th Cir. 1970); *Landry v. State Farm Mutual Automobile Ins. Co.*, 215 So.2d 226 (La. App. 3d Cir. 1968).

Burge v. Doty, 279 So.2d 273 (La. App. 2nd Cir., 1973). See also, *Danos v. Forsythe*, 205 So.2d 821 (La. App. 4th Cir., 1968); and, *Steiner v. Employers Liability Assurance Corp.*, 182 So.2d 345 (La. App. 3d Cir., 1966).

Finally, whenever a motorist enters a preferred thoroughfare from a secondary road, it is that motorist who has the primary obligation of avoiding any collision with a vehicle using the main throughfare.

> . . . a motorist entering a highway from a private driveway or secondary road has the primary duty of avoiding a collision with a vehicle using the main highway until it becomes apparant to him, or should become apparent to a reasonably prudent person under the circumstances, that his entrance to the highway can be made in safety. LSA-R.S. 32:124; *O'Stean v. Safeco Insurance Company of America*, 192 So.2d 620 (La. App., 2d Cir. 1966); *Croom v. Pittsburgh Glass Company*, 148 So.2d 123 (La. App., 2d Cir. 1962).

Bell v. State Farm Mutual Automobile Insurance Co., 216 So.2d 872 (La. App. 2nd Cir., 1968); and, *Rough v. Landry*, 328 So.2d 768 (La. App. 1st Cir., 1976).

Violation of any of these safety provisions of the Highway Regulatory Act, has been specifically found to be negligent per se. *Ruthardt v. Tennant, supra.* Such a violation is actionable whenever it has been a cause in fact of plaintiffs' injury. *Ruthhardt v. Tennant, supra*; and, *Dixie Drive It Yourself System v. American Beverage Co.*, 137 So.2d 298, 242 La. 471 (1962).

C.) Analysis of the Evidence.

On October 3, 1980, at approximately 7:30 a.m., during the early morning rush hour traffic, Anthony Kelly entered Chef Menteur Highway going in an easterly direction from a street three blocks to the West of Crowder Boulevard. (Transcript of Testimony of Anthony Kelly, November 14, 1983, Record Vol. II, p. 21.) At a point approximately one block before the intersection of Chef Menteur Highway with Crowder Boulevard, Mr. Kelly changed to the extreme right hand lane of three lanes of traffic in order to pass a black Chevrolet on its right side. *Ibid.*, at p. 23. It was at this point that Mr. Kelly first noticed the Volkswagon van driven by the defendant, Linda Nicholson. It was stopped at the stop sign controlling the intersection of Crowder Boulevard and Chef Menteur Highway. *Ibid.*, at pp. 24 and 35-36. Mr. Kelly was aware that the van had moved across the west bound lanes of Chef Menteur Highway and entered into the neutral ground area separating the west bound from the east bound lanes. *Ibid.*, at pp. 25 and 36. The next time Mr. Kelly saw the van, it was entering his lane of travel on Chef Menteur Highway immediately in front of him. *Ibid.*, at pp. 38-39.

Mr. Kelly explains what happened next as follows:

> "Q. What happened when you reached the intersection of Crowder and Chef?

> A. Well, I was going home and the Volkswagon van came all the way across the slow lane and to avoid hitting the van I went over to my right between the oak tree and the telephone pole.

Mr. Kelly left the road for what he approximated to be about 50'. He was not aware of the presence of the children of Mrs. King until he saw what appeared to be a red sweater in his rearview mirror as he left the scene. *Ibid.*, p. 27.

Mr. Kelly identified the van, which pulled in front of him as the Volkswagon van driven by defendant, Linda Nicholson, and still at the scene of the accident when he returned there with the police a short while later. *Ibid.*, p. 29.

Additionally, Mr. Kelly identified the van as that van which appeared in Exhibit P-6, a photograph taken at the scene of the accident by the New Orleans Police Department. Mr. Kelly testified that Ms. Nicholson was sitting in the van when he returned to the scene. *Ibid.*, p. 31.

During the course of his testimony, Mr. Kelly admitted that there had been no obstruction of his view on Chef Menteur Highway on that date, and, that he had failed to keep a continuous observation of the traffic entering Chef Menteur Highway from Crowder Boulevard, particularly the van driven by Ms. Nicholson of which he had been aware. *Ibid.*, at p. 56 and 60.

While there had originally been some confusion on Mr. Kelly's part concerning the color of the Volkswagon van that pulled out in front of him on October 3, 1980, and whether or not that van had remained on the scene, the testimony of Ms. Nicholson herself leaves no doubt.

Ms. Nicholson testified that on the morning in question, she had been travelling down Crowder Boulevard towards its intersection with Chef Menteur Highway in the left hand lane. (Transcript of Testimony of Ms. Nicholson, November 14, 1983, Record Vol. II, p. 83.) Ms. Nicholson crossed the west bound lanes of traffic on Chef Menteur Highway and entered into the median area where she stopped. *Ibid.*, p. 83. Ms. Nicholson testified that she saw traffic, which she estimated to be about 2 or 3 blocks to the West. While she could not estimate the speed of the oncoming traffic, she was not concerned about any danger posed by these vehicles. She testified that there was traffic in all 3 lanes at the east bound Chef Menteur Highway. *Ibid.*, at pp 100-104. Ms. Nicholson proceeded to execute what she said to be an "arc kind of turn", ending up in the right hand lane of travel on Chef Menteur Highway by the point at the end of its intersection at Crowder Boulevard. *Ibid.*, at pp. 93 and 96. As she was straightening her vehicle from her turn, at a point approximately equal with the portable sign in the area (the landmarks, distances, and locations testified to are marked on Exhibit P-34, a diagram prepared in connection with his investigation of this accident by Officer Philip Nicaud of the New Orleans Police Department), Ms. Nicholson heard a noise, or commotion, to her right. *Ibid.*, pp. 93-94. She turned to her right and saw the burgundy and grey Cougar driven by Anthony Kelly passing her off the roadway on her right. *Ibid.*, p. 85. Ms. Nicholson testified that she did not know where the Cougar had come from. *Ibid.*, pp. 95 and 105.

The Cougar re-entered Chef Menteur Highway ahead of Ms. Nicholson's van. The bodies of the two minor children of Nancy King came to rest ahead of the van, one in the roadway and one off the roadway to the right. *Ibid.*, at P. 87.

Ms. Nicholson admitted during her testimony, that on the morning of October 3, 1980, she saw no other vans in the location at the intersection between Crowder Boulevard and Chef Menteur Highway, *Ibid.*, p. 88, and further, that on the day following the accident, or perhaps even on the day of the accident itself, a photograph identified as D-USAA No. 1 was taken of her van by a representative of her insurance company. The inference can fairly be drawn that Ms. Nicholson reported to her own insurance company her involvement in the deaths of these two minor children immediately following the accident.

In light of the very testimony of the two principal defendants themselves, the only just conclusion in this matter will be a finding by this Honorable Court of fault on the part of each of these defendants and their respective insurers. Clearly, Linda Nicholson breached her obligation as a left turning motorist, as a motorist at an intersection controlled by a stop sign, and as a motorist turning from a secondary roadway on to a favored thoroughfare. She executed her turn at a time when it was dangerous both to herself and to others in the area to do so. She failed to see the automobile driven by Anthony Kelly, which she should have seen.

Defendant Anthony Kelly breached his obligation to travel within the lawful speed limit, to maintain a proper lookout, and to continously observe the traffic and conditions ahead of him.

Particularly, in light of jurisprudence represented by *Veals v. Manis*, 437 so.2d 359 (La. App. 4th Cir., 1983); and, *Poche v. Frazier*, 232 So.2d 851 (La. App. 4th Cir., 1970), and the presumption of negligence on the part of both and all drivers involved in the injury of innocent third persons, this Court can reach "no other conclusion other than that Kelly and Nicholson are joint tortfeasors."

When faced with facts remarkably similar, if not identical, to the ones presently before the Court, both this Court and other Courts in the State of Louisiana have found both parties to the accident at fault and responsible for the resulting damages. In *Ruthhardt v. Tennant*, 215 So.2d 805, 252 La. 1041 (1968), the Louisiana Supreme Court was faced with a collision occurring between a left turning motorist and a vehicle engaged in a drag race.

> "We have no hesitency in saying that the Court of Appeal correctly found that Ruthardt was negligent. It was wild and reckless conduct of Ruthardt to drag race at 90 to 100 mph in violation of the 45 mph speed limit prevailing at this heavily travelled thoroughfare. His conduct was grossly negligent, amounting to a wanton breach of the duty he owed to the owner of the automobile he had borrowed to use a vehicle in a prudent manner, and to return it in the same or right conditions.
>
> Although we agree that Ruthardt was negligent, we cannot agree that his negligence was the *sole* proximate cause of the damage to the 1957 Chevrolet belonging to Dennis. In our opinion the contention of Dennis is meritorious, and Tennant was also negligent and his negligence continued to the moment of the accident. The negligence of both drivers was therefore simultaneous and concurred to bring about the harm complained of, making them joint tort feasers liable individually jointly and in solido to Dennis for the damage to the 1957 Chevrolet."

215 So.2d at p. 808.

In *Casimere v. Ryder Truck Rental, Inc.*, 324 So.2d 855 (La. App. 4th Cir., 1976), this Court was faced with a collision between a left turning motorist (Coca Cola driver) and a motorist approaching from the opposite direction (Henderson):

> "The pertinent inquiry in determining Coca Cola's driver's negligence is not whether Henderson could have executed an emergency stop if he had been driving safely, but whether Coca Cola's driver could safely negotiate the turn when he did without causing observable motorist (approaching at the right of way) to execute an emergency stop . . . A driver cannot execute a left turn across oncoming right of way traffic and then absolve himself from liability on the grounds that the readily observable motorist (approaching at the right of way) was exceeding the speed limit, or was inattentive or had defective brakes. The pertinent determination is whether it was reasonable for the left turning driver to proceed in the light of circumstances he should have observed in exercising the high degree of care required for this maneuver . . . The record clearly supports the jury's finding that Henderson's negligence was the legal cause of the accident. . . We conclude (without considering intoxication or its effects on reactions) that Henderson could certainly have prevented the accident if he had been travelling at the legal speed and had maintained his braking system in a safe condition. Since there was no evidence to support a contrary conclusion, we would have been

> compelled to reverse the jury's finding if that body had absolved Henderson of negligence."

342 So.2d at p. 862.

In that case, once again, both drivers were held responsible, jointly, severally and in solido, for injuries sustained by innocent third parties.

In *Robert v. Travelers Indemnity Co.*, 196 So.2d 657 (La. App. 1st Cir., 1967), the negligence of the left turning motorist was not even an issue upon appeal, but assumed. The issue was any negligence, contributory or concurrent, on the part of the driver of the vehicle on the favored thoroughfare.

> "Though a driver may be traveling on a favored street, he is not excused of the responsibility of looking into the direction from which other traffic may be expected to come. When he should reasonably realize that traffic will continue and will obstruct his passage across the intersection, he is guilty of negligence if he fails to take every precaution to avoid a collision. Traveling on a favored street does not relieve a motorist of his obligations to operate his vehicle in a prudent manner with due respect for those who might be crossing a right of way street and to comply with all provisions of traffic regulations. . . . When he saw the truck and saw that it was continuing onto the highway and would obstruct his passage to cross the intersection, he is obliged to take every precaution to avoid a collision. When he saw the truck entering the highway, he had sufficient time

> to react and ample opportunity to slow his vehicle and bring it to a stop."

196 So.2d 657 at pp. 659-660.

The driver of the vehicle traveling along the favored thoroughfare was barred from recovery for his injuries for his own contributory and concurring negligence. However, the passengers in his vehicle, innocent third parties, were allowed to recover from the left turning motorist.

There remains no doubt that the facts in this case compel a result in conformity with the jurisprudence outlined above.

CONCLUSION

For all of the foregoing reasons, plaintiff/appellant, Nancy King, prays for the judgment of this Court affirming the verdict below in part and reversing it in part, to find fault on the part of both of the defendants Kelly and Nicholson and their respective insurers, holding them liable jointly, severally and in solido in the amount of $300,000.00, which amount was found by the jury to fairly compensate Nancy King for her tragic loss.

Respectfully Submitted;

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FOURTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

NUMBER: CA-3351

Elton J. King

Plaintiff/Appellant

versus

State Farm Mutual Automobile Insurance Company and Mandy Kelly, Father of the Minor, Anthony Kelly, and United Services Automobile Association, and Donald and Linda Nicholson

Defendants/Appellees

consolidated with

Nancy H. King

Plaintiff/Appellant

versus

Mandy Kelly, State Farm Mutual Automobile Insurance Company and Cumis Insurance Society, Inc.

Defendants/Appellees

Appeal From The Civil District Court
For The Parish Of Orleans
Honorable Joseph P. DiRosa, Judge

Supplemental Brief
On Behalf Of Appellees, Donald and Linda Nicholson, And United Services Automobile Association

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OBJECTION TO ASSIGNMENT OF ERROR WITH REGARD TO JURY CHARGES

Plaintiff/Appellant, Mrs. Nancy H. King belatedly asserts in her Appellate Brief that the Trial Judge's failure to include in his charges to the jury and instructions relating to the allegations of negligence on the part of Mrs. Linda Nicholson, which we deny, was manifestly erroneous, and requires reversal of the judgment below. Plaintiff/Appellant, Mr. Elton King, also asserts in his Appellate Brief that the Trial Judge's failure or refusal to include in his charges to the jury any instructions relating to the duty of a left-turning motorist was manifestly erroneous. However, neither can assign as errors the failure to give the aforementioned instructions because of the mandatory provisions of La. C.C.P. Art. 1793(C) which state:

> A party may not assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and his grounds for his objections. Opportunity shall be given to make the objections out of the hearing of the jury.

The only objection to the jury charges relating to Mrs. Nicholson's alleged negligence by Mrs. King and Mr. King were general "en globo" objections, which appeared as follows: (See pages 129-136 of Trial Transcript.)

MR. WESSEL: I am going to object to the court not giving the two other objections of mine that were submitted.

THE COURT: I gave one.

MR. WESSEL: I think I gave you three.

THE COURT: You only gave two.

MR. WESSEL: No, the other one. I also adopted the instructions of Mr. Warshauer, and I object to the Court not giving those.

THE COURT: How many of those?

MR. WARSHAUER: One out of twenty your Honor.

THE COURT: The other I thought was covered in the general charge.

MR. WESSEL: In addition, Your Honor, I stated you specifically in connection with your instruction on medical bills that you would include hospital bills and you did not. And also funeral bills, and you did not include that on the instructions.

THE COURT: Well, it said all the charges for medical. That's a general charge. I believe that covers it.

MR. WESSEL: Well I don't think it did. So that's why I object.

THE COURT: All right.

MR. WESSEL: Now in order for me to complete the record I previously made a proffer, and I will attach it here.

THE COURT: No. Seal it in an envelope and mark it Proffer 1 or Proffer 2. It does not form any part of the record.

MR. WARSHAUER: Your Honor read my requested jury charge Number 18, but I object to the Court's refusal to read my other nineteen special requested jury charges.

I also object to the Court's failure to read Mr. Wessel's other requested jury charge which I adopted.

And I object to the Court's failure to give Mr. Mitchell's charges eight through eleven.

THE COURT: Let him make any objection.

MR. WARSHAUER: Also Your Honor read instructions to the jury concerning damages for future injuries by mistake.

THE COURT: If I did it was my mistake.

MR. WARSHAUER: I object to that.

THE COURT: If I did that was my mistake.

Mrs. Nancy King and Mr. Elton King's blanket objections to the Trial Court's refusal to give all requested charges, without the assignment of any reason whatsoever, did not comply with the statute requiring litigants to state grounds for objections to the refusal of *each* special charge, and therefore forfeited the right to complain on appeal of any injuries resulting. See, *Wright v. State Farm Mut. Ins. Co.*, 397 So.2d 8, La. App. 1981; *Kolmaister v. Connecticut General Life Ins. Co.*, 370 So.2d 630, La. App. 1979; *Lea v. Baumann Surgical Supplies, Inc.*, 321 So.2d 844, La. App. 1975. The purpose of the requirement that grounds for each objection to the denial of requested jury charges be stated is to afford the Trial Court an opportunity to reweigh its refusal in light of the merits, if any, of grounds advanced by counsel making the objections. *Id.*

The only reference to the special charges for which an objection was made to the Trial Judge was by *number*. No statement was made of the principles of law contained in

each "numbered" jury charge objection, nor of the grounds for their objections. Blanket objections to charges, such as "I will *object to all of the charges that were given" is not sufficient to preserve the point for appeal.* See, *Vitari v. Lewis*, 361 So.2d 476, La. App. 1978. In order to preserve the right to appeal from the failure to give a requested instruction, a litigant adversely affected, such as Mr. Elton King and Mrs. Nancy King, must enter their objection into the record before the jury retires to consider its verdict, and in addition, must enter of record the specific matter which he contends is objectionable and his grounds therefor. See, *Bechtel v. Entringer Bakeries Inc.*, 422 So.2d 1299, La. App. 1982. In the absence of proper objections to any refusal or failure to give a requested instruction, neither Mrs. King nor Mr. King could assign as error the failure to give those instructions. See, *Katz v. Insurance Co. of North America*, 150 So.2d 879, La. App. 1963.

The Trial Judge made the following charge to the jury, which would encompass the aforementioned contentions of error:

> When an innocent third party is injured in an automobile accident there is the presumption of negligence on the part of the drivers and each has the burden of exculpating himself from negligence.
>
> Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent (sic) would do.
>
> It is, in other words, the failure to use ordinary care under the circumstances in the management of one's property. Ordinary care

is that care which reasonably prudent persons exercise in the management of their own affairs in order to avoid injury to themselves or their property, or other persons or property of others. Ordinary care is not an absolute term, but a relative one.

That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in light of all the surrounding circumstances as shown by the evidence in the case.

The mere fact that an accident happened, standing alone, does not, unless otherwise stated, permit the jury to draw the inference that the accident was caused by anyone's negligence.

An injury or damage is proximately caused by an act or failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

This does not mean that the law recognizes only one proximate cause of an injury or damage consisting of only one factor or thing, or the conduct of only one person.

On the contrary, many factors or things or the conducts of two or more persons may operate at the same time, either independently

> or together to cause injury or damage, and in such a case each may be a proximate cause.
>
> The driver of an automobile is chargeable with knowledge of all conditions which could be obtained by the reasonable exercise of his or her faculties. It is his or her duty to see that which is in plain view or open and apparent and to take notice of all obvious dangers. He or she must be regarded as having seen what he or she would have necessarily seen had he or she been looking.
>
> (pp. 122-125)

As long as the instructions given by the Trial Judge are clear and reflect an adequate statement of the law, there exists no error simply because a Judge uses his language rather than counsel's. *Alexander v. Alton Ochsner Medical Foundation*, 276 So.2d 794, La. App. 1973. Furthermore, a Trial Judge is not required to give charges that consist of a restatement of the law in terms that each counsel may feel is most favorable to his case, particularly when the subject matter is covered elsewhere in the general charge. *Hayes v. Baton Rouge General Hospital*, 298 So.2d 506, La. App. 1974. The Trial Judge's refusal to elaborate on certain points as requested by the plaintiffs and on other points as requested by the defendants does not constitute error.

CONCLUSION

Mrs. Nancy King's and Mr. Elton King's blanket objections to the Trial Court's refusal to give all of their requested special charges, which were referred to only by "number," and without assigning any reasons whatsoever, did not comply with La. C.C.P. Art. 1793(C), which requires litigants to

state their grounds for objections to the refusal of *each* special charge. They thereby forfeited their right to assign as errors the failure to give those instructions.

Appellate review is very stringent. See, *Canter v. Koehring*, 283 So.2d 716, 724, La. 1973. A jury of twelve people heard all the facts, were charged to decide the case independently and without bias, and were unanimous in their verdict that Anthony Kelly was completely at fault, and that Linda Nicholson was not at fault. The general jury charge contained an adequate statement of the law, in that it encompassed both Linda Nicholson and Anthony Kelly as being possibly negligent and therefore liable, unless either could exculpate themselves by showing the reasonableness of his or her conduct under the circumstances. The jury believed, based on their verdict, that Linda Nicholson's conduct was reasonable under the circumstances, and was therefore not negligent.

There was evidence before the jury which, upon its reasonable evaluation of credibility, furnished a reasonable factual basis for the jury's findings. Therefore, this Honorable Court of Appeal should not disturb this finding, because there was no manifest error made when the jury found that Linda Nicholson was not negligent. The jury's finding is fully supported by the evidence and should be maintained.

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COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

NO. CA 3351

ELTON J. KING,
PLAINTIFF/APPELLANT
VERSUS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and MANDY KELLY, Father of the Minor, ANTHONY KELLY, and UNITED SERVICES AUTOMOBILE ASSOCIATION, and DONALD and LINDA NICHOLSON,
DEFENDANTS/APPELLEES

SUPPLEMENTAL BRIEF ON BEHALF OF NANCY KING, PLAINTIFF/APPELLEE

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COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

NO. CA 3351

ELTON J. KING,
PLAINTIFF/APPELLANT
VERSUS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and MANDY KELLY, Father of the Minor, ANTHONY KELLY, and UNITED SERVICES AUTOMOBILE ASSOCIATION, and DONALD and LINDA NICHOLSON,
DEFENDANTS/APPELLEES

MAY IT PLEASE THE COURT:

A Supplemental Brief has been filed herein on behalf of Defendants/Appellees, Donald and Linda Nicholson and United Services Automobile Association, in which Appellees for the first time raise objections to certain assignments of error made on behalf of the various parties Plaintiff/Appellant hereto. Plaintiffs/Appellants Nancy King Carr and Elton King have each pointed to error on the part of the trial court in failing to instruct the jury on the law regarding the obligations of a motorist under similar or identical circumstances to those in which Mrs. Linda Nicholson found herself on the day on which the Kings' two minor children were killed. Defendants/Appellees, the Nicholsons and their insurer, United Services Automobile Association, have objected to the manner in which Plaintiffs' objections to the jury instructions were preserved at the trial on the merits. Defendants

claim not that the Plaintiffs failed to timely object to the instructions, but instead claim that the manner in which those objections were preserved violated the provisions of the Louisiana Code of Civil Procedure, Article 1793(C).

The actual course of events at the trial on the merits was as follows. A charge conference was held prior to the closing arguments of counsel. In attendance were the Judge, each of the counsel representing all of the various parties to the litigation, and the court reporter. Why the court reporter failed to record and/or transcribe the proceedings, including the objections of counsel and the reason therefor, this writer cannot say. It can only be said that the transcript is not to be found in the record of these proceedings. At the charge conference, counsel on behalf of all parties argued extensively regarding the proper instructions which should be read to the jury. At that conference, both counsel for Nancy King Carr and counsel for Elton King argued strenuously that the various proposed instructions regarding the obligations of Linda Nicholson should be read to the jury. The reasons why counsel felt these instructions necessary were discussed at length. In the final event, the trial court refused to read the instructions, and requested that counsel return to the courtroom. Following the actual charge to the jury having been made, the trial court instructed the parties to repeat their objections in open court and for the record. At that stage of the proceedings, the jury had already been charged. At no time did counsel for the defendants object to the procedure directed by the court.

In *Suhor v. Gusse*, 388 So.2d 755 (La. 1980), the Supreme Court was faced with a situation in which defendants raised the same objections to plaintiff's assignment of error. In that case, as in this, a charge conference was held at which all of the instructions were discussed, including discussion of plaintiff's objections to the failure of the court to instruct on

certain issues, and formal objections were preserved for the record following the charge to the jury and submission to the jury. While acknowledging that such a procedure did not conform with the letter of the requirements found in Louisiana Code of Civil Procedure, Article 1793, the court found that the appeal on the failure of the lower court to give certain instructions was properly before the court. In a footnote to its decision, the court described the procedure, apparently identical to the one followed in this case, and found that it was defendant's complaint regarding the procedure followed below which had been waived and not plaintiff's objections to the court's failure to instruct.

> "In the instant case, while plaintiff did not object to the instruction before the jury retired, the record reflects that at the 'charge conference' prior to instructing the jury, plaintiff's request to permit the jury to hear the amount of the Allstate policy in order to refute the evidence of inability to pay, which the court allowed to be presented to the jury over plaintiff's objections, was denied. Moreover, immediately after the jury was charged to retire to consider its verdict, each party made its objection to the giving or failure to give certain instructions. This was done without objection by any party. Accordingly, under the circumstances, any complaint that plaintiff 'may not assign as error' the giving of the above instruction has been waived and the assigned error is properly before us for review."

388 So.2d at 391, fn. No. 6.

To permit Defendants/Appellees to accede to an improper procedure without objection or complaint and later use such impropriety to insulate themselves from plaintiff's right to appeal, would be totally unjust. For this reason, the Supreme Court in *Suhor, supra*, ignored the "mandatory" requirements of the Louisiana Code of Civil Procedure, Article 1793, and considered the assignments of error regarding the failure to instruct.

The very cases cited by Defendants/Appellees in their Supplemental Reply Brief explain the reasons for the procedure outlined in Article 1793 as follows:

> "The proper and efficient administration of civil jury trials demands that a trial judge be given an adequate opportunity to recognize and correct errors he may have committed in his instructions before submitting the case to the jury. Therefore, it is important that the provisions of the Code which seek to accomplish this end be endorsed, and that a litigant should not be allowed to state for the first time on appeal the specific matter and grounds involved in his objection."

Watts v. Aetna Casualty & Surety Company, 309 So.2d 402, 405 (La. App. 1975); and *Lea v. Baumann Surgical Supplies, Inc.*, 321 So.2d 844, 853 (La. App. 1975).

In this case, while the exact provisions of CCP Article 1793 may not have been followed, the underlying purposes of the statute were achieved at the charge conference held by the court prior to the closing arguments of counsel and the charging of the jury. Under these circumstances, to refuse to entertain an appeal based upon the trial court's failure to properly instruct the jury would gravely injure the Plaintiffs/

Appellants without serving any useful purpose.

Therefore, Plaintiff/Appellee Nancy King Carr is entitled to the Judgment of this Court reversing the verdict of the jury with respect to the liability of the Defendants, Donald and Linda Nicholson, and their insurer, United Services Automobile Association, and rendering Judgment in her favor and against said Defendants in the amount determined by the jury to fairly compensate her for the deaths of her two minor children, namely THREE HUNDRED THOUSAND AND NO/100 ($3,000,000.00) DOLLARS. Further, Nancy King Carr is specifically entitled to recognition by this Court that her objections to the instructions of the court below were properly preserved and are properly before this Honorable Court on appeal.

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ATTORNEYS FOR NANCY KING CARR

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Supplemental Reply Brief on behalf of Plaintiff/Appellee, Nancy King Carr, was served upon all counsel of record by placing same in the United States Mail, postage prepaid, this 15th day of July, 1985.

/s/ VICTORIA LENNOX BARTELS
VICTORIA LENNOX BARTELS

A-105

Office Of The Clerk
COURT OF APPEAL, FOURTH CIRCUIT
State of Louisiana

Danielle A. Schott
Clerk of Court

421 Loyola Ave.
New Orleans, Louisiana 70112
568-4700

August 5, 1986

Re: No. CA-3351 c/w CA-3352, King vs State Farm Mutual Automobile Insurance Company, et al.

To Whom It May Concern:

Please be advised that in the above captioned matter, briefs were filed on behalf of some of the parties as follows:

Brief by Elton King (represented by Joseph Thomas) was filed in this Court on March 20, 1985.

Brief by Linda and Donald Nicholson and United Automobile Assn. (represented by Timothy Schafer) was filed in this Court on May 2, 1985.

Brief by Nancy King (represented by William F. Wessel) was filed in this Court on May 10, 1985.

Sincerely,

/s/ Danielle Schott
Danielle Schott
CLERK OF COURT

DS/sb

A-106

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

NOS. CA 3351 & 3352

ELTON J. KING; NANCY H. KING

versus

STATE FARM MUTUAL AUTOMOBILE INS. CO.,
MANDY C. KELLY et al.

APPEAL FROM
CIVIL DISTRICT COURT, PARISH OF ORLEANS
DIVISION L, NOS. 81-15497 and 15706
HONORABLE JOSEPH V. DiROSA, JUDGE

WILLIAM V. REDMANN
CHIEF JUDGE

(Court composed of Chief Judge William V. Redmann and Judges Denis A. Barry and Robert L. Lobrano)

March 12, 1986
REVERSED IN PART

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Two children, ages seven and 11, were killed by an automobile when it left the highway to avoid hitting a van that had just entered the highway. The divorced parents of the children brought separate wrongful death actions against the vehicle drivers and insurers. The parents now appeal from a judgment that (1) dismissed the mother's action against the van's driver and its $200,000-limit insurer, while awarding her $300,000 against the automobile's driver and his father and (within their limits) his $10,000-limit insurer and the mother's own $25,000-limit uninsured motorist insurer, and (2) dismissed the father's action against both drivers and their insurers on the basis that his damages were zero.

The question in the mother's appeal is the liability of the van driver, who, to make a left turn at a T-intersection with a six-lane highway with 19-foot median, after stopping in the median, crossed all the way into the third left-bound lane, providing the occasion for a 15-year-old driver in that lane (going perhaps 45 mph in a 40 mph zone) to drive over the right curb just 43' past the intersection to avoid hitting the van, and then to strike and kill the two children waiting for a bus 50' farther away.

The added question in the father's appeal is whether the jury was clearly wrong in fixing the father's damage from the wrongful deaths at zero because of the slight interest he demonstrated in the children during the six and a half years after his separation from their mother – as by paying court-ordered child support only once during the last two years of their lives despite being regularly employed.

We reverse the dismissal of the van driver and her insurer from the mother's action but affirm the dismissal of the father's action.

I

The father sued for $100,000 for "loss of support, society, love and affection" and $150,000 for his grief. The children were about 15 months and four years eight months old when the parents separated, over six and a half years before the children's death. Although the father testified that he regularly paid child support from February 1974 until 1977, the mother testified that she had to take him to court. And, although he was regularly employed as a schoolteacher, he did not regularly contribute after 1977, but he did make one $75 payment to a Mobile court about five moths before the October 3, 1980 death of the children. The mother testified that he saw the children seldom after the separation; he did not visit them during the last 23 months they were alive; he telephoned them once and wrote once in response to one's written request during their last two years.

It is the jury's function and province to evaluate the credibility of witnesses, and the jury plainly disbelieved the father's protestations of interest in and affection for the childern. The jury does not, of course, have the authority to deny damages to a damaged parent as punishment for not paying child suppport. But not every biological parent is

damaged by his or her child's death, and parents are only entitled to "the damages which they sustained through the wrongful death of the deceased," La. C.C. 2315. One who is little more than the legal and biological parent of a wrongly-killed child, without being a partner in a valuable parent-child relationship the destruction of which damages the parent, is not entitled to a monetary award for the death of the child. *Mitt v. Security Ins. Co.*, 361 So.2d 465 (La. App. 4 Cir. 1978), cert. denied 362 So.2d 1116.

Our facts are not so clear as those of *Mitt*, where the child, 17 at death, had been raised since age one not by the mother (much less by the legal father) but by the biological father and his family. Nevertheless our jury, by believing the mother and disbelieving the father, could reasonably have concluded that this father's relationship with his children was such that its destruction did not damage him to the extent that courts should grant him monetary recompense. In that conclusion, although it may be a close question, we cannot say, without having observed the witnesses, that the jury was "clearly wrong," as required to reverse by *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978).

II

In its conclusion that the van driver was not negligent, on the other hand, the jury was clearly wrong (irrespective of whether, as appellants argue, the jury charge was erroneous).

Only 42'11" from the Crowder Boulevard southbound lane from which the van turned left into the automobile's eastbound lane on Chef Menteur highway, the automobile had to climb the right curb off the highway to avoid hitting the van. (The car was unable to veer into the middle lane, apparently in part because the van was turning through the middle lane – in violation of La. R.S. 32:101(3)'s command

to turn into "the safest lane" – but also because an otherwise unidentified black car was traveling in the middle lane.)

The extreme shortness of that distance proves the van driver's contributory fault in having turned into a lane when it was not safe to do so.

The clear explanation for the jury's clear error in failing to see fault so evident is the testimony of Duaine T. Evans. Evans's testimony, given as an expert, would place the automobile 1,048' away and able to stop in only 139' if traveling at the 40-mph speed limit when the van began to move into the intersection from its stop in the median.

That testimony must be rejected, first, because it is clearly wrong in calculating that critical distance on the basis that the automobile's speed of 45 mph is 75 (rather than 66) feet per second and, second, because it is based on two unsound assumptions that were provided (no doubt in good faith) by the lawyer for the van's driver and insurer.

The expert's own error of using 75 instead of 66 fps was presumably the result of a "slip of the finger" on his calculator. He explained that he multiplied mph by 1.4667 to get fps, but apparently he multiplied the 45 mph by 1.667, erroneously omitting the 4 of 1.4667, and thus obtained 75 instead of 66 fps. He used 75 throughout his critical calculations, which would have to be discarded on that score alone.

Moreover, the two assumptions that the lawyer gave the expert, both factual, were both inconsistent with or unsupported by the evidence and (as to the second) common experience, but were both used by the expert in calculating that 1,048' distance.

The first assumption was that, by the time the automobile caught up with the van, the automobile had traveled to a portable sign located 149'11" from the left southbound Crowder lane from which the van entered. The expert then calculated 179' as the distance the car would have traveled from the median to reach that 149'11" point, allowing for the crossing of Chef Menteur's eastbound lanes into the center of the far lane (a perpendicular distance of 29'3") on an assumed arc of a circle (which he calculated, unexplainedly, at 77'; a 90^{o} arc of a circle with a 29'3" radius would be 45.95') plus an added distance to allow for starting from the center of the left southbound Crowder lane.

That first factual assumption ignores the physical evidence that the automobile left the highway only 42'11" away from the intersection at which the van entered the highway, and it also ignores the van driver's testimony, consistent with the 42'11" physical evidence, that after reaching the far lane she had traveled not "three or four lenths?" but "perhaps two or three lengths" of her Volkswagen van before she realized the automobile was passing on her right. A police officer estimated the length of the Volkswagen van at 14'. (We deem less reliable the driver's estimate of 20'. That would add only 12 to 18' in any event.) If the center of the front of the van had traveled two or three 14' lengths, 28 to 42', after reaching the center of the far lane on a circular path approximately 21' (29'3" radius less 8'3.5" distance to the middle of the left southbound Crowder lane) from the intersection, the front of the van would have been about 49 to 63' past the intersection at about the time that the automobile passed it on the right. The fact that the automobile went up on the curb 42'11" past the intersection to avoid hitting the van supports the inference that the rear of the van was not much farther past the intersection than 43' at that moment, and the front not much farther than 57'. Furthermore, if the speeds were 45 and 15 mph, as testified, then the automobile

would travel three feet for every foot the van traveled. Thus, if the front of the van were about 63' – make it 64' – from the intersection as the automobile passed it, as just estimated from the driver's testimony, then from the time the automobile hit the curb the van would have traveled about seven feet from its position at 57', while the automobile would have traveled 21' (3 X 7') from its position at 43'. Thus when the front of the van was at 64', the front of the automobile would have been at about 64' (43' + 21') from the intersection, about to pass the van.

It is true that the van driver also testified that she was near the portable sign when the automobile passed – 149'11" rather than 63' or so from the intersection – but that testimony is not as consistent with the physical evidence that the automobile climbed the curb 42'11" from the intersection, as just shown. Thus the expert testimony, based on the assumption that the automobile passed the van at 149'11" past the intersection, was not well founded factually because of its failure to reconcile the van driver's internally inconsistent testimony with the conflicting physical evidence.

The second factual assumption that the expert accepted from the lawyer was so clearly wrong that the expert himself noted its wrongness. The assumption was that, instead of accelerating immediately to 15 mph and then continuing at that speed, the van driver would accelerate uniformly over the entire distance of 179' to the (wrongly) assumed point where the automobile passed. Speaking of the lawyer's instruction to so calculate, the expert testified:

> "He said that it would accelerate to 15 mph in that distance. Well, I know that it can accelerate [to] far greater speeds within that distance."

That second assumption given to the expert by the lawyer is unsupported by any testimony by the van driver or any other evidence, and it is also contrary to common experience. But the expert obeyed instructions. He testified:

> "If the van is traveling from zero speed to 15 mph it would have required [about] 16 seconds to travel that distance . . . . And if the [automobile] were traveling at 45 mph, that's seventy-five feet per second [*sic*; 66 fps is correct] for 16 seconds, this [75' x 16.27 seconds] comes out to be 1,220' [from the sign and] . . . 1,048' [from mid-intersection] . . . . Subtract 172' from 1,220 and you get 1,048."

Continuing, the expert testified that the automobile could have stopped with maximum braking within 139' if traveling at the speed limit of 40 mph (89' braking distance plus 50' reaction-time travel). The evident conclusion was that, because one can stop in 139' if traveling at the 40 mph limit and this automobile had 1,048' to stop, the automobile was exclusively to blame: and that was the jury's conclusion. We repeat that that conclusion is unsupported except by that expert's testimony, and that that testimony is itself unsupported by the record.

The second assumption under discussion – that acceleration or increase in speed was uniform from 0 to 15 mph over the entire distance of 179' – is contrary to common experience. The assumption of uniform acceleration from zero has no other virtue in this case than that it makes it easy to calculate time taken to reach a given speed in a given distance. When acceleration is uniform the time (in seconds) equals the distance in feet divided by half the number of feet per second in the final speed. If acceleration were uniform from 0 to 15

mph over 179', requiring a time (as the expert testified) of 16.27 seconds, it would be far more gradual than the common experience of drivers. The acceleration would be (i.e., the speed would increase by) only 1.352' per second each second. At that acceleration, the distance traveled in the first second would be only .676', or eight inches. In the following seconds, as speed increased by 1.352' per second each second, it would be 2.028, 3.380, 4.732, 6.084'. In five seconds, the van would have moved only 16.9' under that acceleration. In the remaining seconds, it would travel about 7.4, 8.8, 10.1, 11.5, 12.8, 14.2, 15.5, 16.9, 18.3, 19.6, and 21', plus almost 6' in the final .27 seconds as it reached the speed of 22 fps, making the total distance in 16.27 seconds the 179' assumed.

The common experience of persons who have driven an automobile – especially across three lanes of highway traffic going to work in the morning – is that when one gives one's automobile gas to begin moving the automobile does not move only eight inches in one second, or only 17' in five seconds. The width of the fast lane on Chef Menteur at the intersection in question is 11'9": common experience is that it does not take over four seconds, even giving only a moderate amount of gas, to move across a 12-foot lane of highway from a stop. The lawyer's assumption of uniform acceleration is clearly wrong – as, to repeat, even the expert acknowledged although he used that assumption as instructed.

The consequence is that the expert's conclusions – based on three clearly wrong foundations – are clearly wrong.

This discussion of the van driver's negligence began by noting the short (and indisputable) distance of 43' from the van's entering the highway to the automobile's having to leave it. It is obvious that the van entered the automobile's lane when it was not safe to do so. But, so as not to say

merely that that is obvious, we re-do the expert's calculations – although we are wary of all calculations from mere estimates of time, distance, and speed, because the inaccuracy of the estimates tends to be forgotten when they are overlaid with the accuracy of "scientific" calculations. We recalculate on assumptions that jibe, primarily, with the undisputed physical evidence, but also with the consistent testimony of the van driver and the common-experience assumption that the van accelerated normally to its intended final speed of 15 mph and then continued at that speed.

As detailed above in rejecting the first factual assumption that the lawyer gave the expert, the van's front would have been not 149'11" but on the order of 64' past the intersection when the automobile drew alongside. To reach taht point, starting from the median at the middle of the extension of the left southbound Crowder lane, and assuming the path was an arc of a circle from that point to the center of the far Chef Menteur lane, the van would have traveled 45.95' in the arc of the turn, straightening out 29'3" not from the intersection but from the center of (the extension of) the left southbound Crowder lane, which is 8'3.5" east of the intersection. Thus on straightening out the front of the van would have been about 21' from the intersection, or 43' (about three 14' van lengths) from the critical 64' point. So its total travel to that latter point was about 89' (45.95' – say 46' – for the arc plus 43').

To travel 89' with uniform (which is minimum) acceleration to 15 mph would take only 8.1 seconds (89 divided by 11). To travel 89' with normal acceleration to, and then a steady speed of, 15 mph would take less: with maximum acceleration, about 4.6 seconds. We can calculate that time because we know the distance that maximum acceleration would require to reach 15 mph, from the testimony of the expert that it would take the van 12.5' with maximum negative

acceleration (deceleration, from braking) to stop from 15 mph. The formula of distance divided by half of speed tells us that it would take the van only 1.136 seconds (12.5 divided by 11) to decelerate from 15 to 0 mph or (if the van's engine were capable of maximum acceleration) to accelerate from 0 to 15 mph, or 22 fps, in 12.5'. Because the van's total travel distance was only about 89' until overtaken, then after that 12.5' the van would have only 76.5' more to travel at a speed of 22 fps, so that only another 3.477 seconds would be required. Thus, if the van were capable of maximum acceleration and were accelerated at maximum acceleration up to 15 mph and then continued at a steady 15 mph, it would take only 4.613 seconds to reach the point where the automobile overtook it (if, indeed, the van driver's estimate of only 15 mph in morning rush-hour highway traffic be correct). During that 4.613 seconds, the automobile at 45 mph or 66 fps would have covered 304.5' to bring it 64' past the intersection: it would have been only 241.5' away from the east side and only 208.5' away from the west side of Crowder southbound (itself a total of 33' wide) when the van started to pull out from the median.

The record does not support a conclusion that the Volkswagen van was capable of maximum acceleration. But the record does support, in the expert's testimony, a conclusion that the Volkswagen van was capable of far greater acceleration than the minimum forced upon the expert by the lawyer's good-faith but clearly wrong assumption. If one add a second or so to the van's travel time (increasing from 4.613 seconds minimum to 5.613 or so, but not to the 8.1 maximum of uniform acceleration), one adds only 66' or so to the automobile's distance away.

One may still blame the automobile driver for not having timely realized the van's intent to cross into his far right lane, though not necessarily from the second that the van started

to move into the far left lane. (The expert testified that it could have taken the van as long as ten seconds to reach the far right lane. We have rejected his calculations, but there would have been at least a second or two during which it would not have been obvious that the van was going to cross the other two lanes of the highway and turn into the automobile's lane.) The automobile driver very probably should have realized, at a time when he still could have responded safely, that the van was entering his lane. But his failure to do so does not exculpate the van driver. The van driver's duty not to enter a lane when it is not reasonably safe to do so because of an approaching vehicle includes, within the risks it seeks to avoid, the risk that a driver who has not much more than a minimally reasonable, mathematically demonstrable opportunity to stop or sufficiently slow may not use that opportunity, because of inattention, inexperience or other foreseeable cause. The van driver breached that duty and the failure by the automobile's 15-year-old driver to compensate for the van driver's breach by braking immediately, or at least quickly, may put him at fault but it does not excuse the van driver's fault. As between the two drivers, even, comparative negligence might apply. But as to innocent third persons injured by their collision or near-collision, each driver is liable in solido.

Decree

The judgment appealed from is affirmed insofar as it dismissed Elton J. King's action, but reversed insofar as it dismissed the mother's demand against the van driver and her insurer. There is judgment for Nancy H. King for $300,000 against Linda Nicholson and, to the extent of its $200,000 limit for injury to more than one person, against United Services Automobile Association, in solido with each other and with the previously cast defendants, with interest from judicial demand and all costs.

A-118

SUPREME COURT OF LOUISIANA

NO.

NANCY H. KING,

Plaintiff-Respondent

-versus-

MANDY KELLY,
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY AND
CUMIS INSURANCE SOCIETY, INC.

Defendants-Respondents

AND

LINDA AND DONALD NICHOLSON
AND UNITED SERVICES AUTOMOBILE ASSOCIATION

Defendants-Petitioners

Petition for Writ of Certiorari or
Review to the Court of Appeal
Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI OR REVIEW

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF LOUISIANA.

The petition of Linda and Donald Nicholson and United Services Automobile Association, defendants-petitioners, respectfully apply for a Writ of Certiorari or Review from the final opinion of the Court of Appeal, Fourth Circuit, State of Louisiana, in the above-entitled matter, bearing the number CA-3352 on the docket of the Court of Appeal, Fourth Circuit, State of Louisiana.

STATEMENT OF THE CASE

After striking and killing two children with his automobile, fleeing the scene, and pleading guilty to negligent homocide, Anthony Kelly attempted in this lawsuit to implicate another motorist as an excuse for his actions. An Orleans Parish Jury was obviously not impressed with Mr. Kelly's testimony; Mr. Kelly, the accuser, was found to have been solely at fault for the accident and Mrs. Nicholson, the accused, was totally exonerated from any responsibility for the injuries to and death of the two King children. The Court of Appeal, becoming its own self-appointed accident reconstructionist, assumed facts at will, used unproven and incorrect formulas, and ignored testimony that the jury found to be credible for the purpose of reconstructing the accident in such a fashion as to impose fault on Mrs. Nicholson.

The relevant facts began shortly after 7:00 a.m. on Friday, October 3, 1980, when Anthony Kelly asked his father for permission to use the family automobile, a 1979 Mercury Cougar, to go to the Tastee Donut Shop on Chef Menteur Highway. Upon leaving the doughnut shop, he proceeded

away from his home for the alleged purpose of driving an unknown and unidentified "friend" of his father's to some location on Flake Street. He then drove two blocks farther away from his home before turning to re-enter Chef Highway at a point three blocks from the intersection of Chef Highway and Crowder Road.

The intersection of Chef Highway and Crowder Road forms a "T". Chef Highway, which is a six-lane divided road that accommodates east and westbound traffic, is the through top of the "T". Crowder Road, which is a four-lane divided road that accommodates north and southbound traffic, has a stop sign on the north side of the intersection, but no controls on the median between the east and westbound lanes of Chef Highway.

At the time Anthony Kelly entered the eastbound lanes of Chef Highway, there was only one other eastbound vehicle, a black Chevrolet, which was traveling in the center lane. Anthony Kelly admitted that he speeded up, clearly above the speed limit, and passed this other vehicle on the right. He had a bag of doughnuts on the front seat of his car and the radio was playing.

He testified that he saw Mrs. Nicholson's Volkswagen Van (actually a van/bus) on two separate occasions before the accident although he contradicted himself concerning his and its location on those occasions. In the version which the jury obviously believed, he stated that he first saw the Volkswagen as it was **entering** the median and did not notice it again until it was **fully** in the right eastbound lane of Chef Highway and was headed directly eastbound. His failure to see the Volkswagen Van between those two points was apparently attributed to his attention to the radio or his concern for the doughnuts.

In either event, upon realizing that the Volkswagen Van was ahead of him, he swerved to the right. He also said that he jammed on his brakes and skidded. However, after learning that the police officer found no skid marks on the roadway, he claimed that he did not apply his brakes with sufficient force to skid. Upon leaving the roadway, he struck and killed the two King children who were standing at a bus stop at the eastern end of the intersection. **After striking the children, he passed the Volkswagen Van on its right** without striking it, returned to the roadway, and sped away. The jury unanimously found that Anthony Kelly was negligent.

Mrs. Nicholson testified that she worked in New Orleans East and regularly turned from the southbound lane of Crowder Road into the right eastbound lane of Chef Highway. On the morning of the accident, she stopped on the north side of the intersection and remained stopped until westbound Chef Highway traffic cleared. She then drove into the median area and stopped again for eastbound traffic. When the immediate traffic cleared, she observed that while some traffic was approaching, it was over two blocks away. Because the traffic presented no immediate hazard, she turned into the right eastbound lane of Chef Highway.

When she reached a point adjacent to a portable sign, she heard a commotion to her right rear. The sign was located 149'11" from the eastern curb of the southbound lane of Crowder (a point hereinafter referred to as EC-SBLC) 172' from the center of the southbound lanes of Crowder and 54' past the bus stop. Upon looking in the direction of the commotion, she saw a Mercury Cougar approaching and passing on her right. She immediately stopped her vehicle. The Cougar seemed to slow momentarily and then left the scene. The jury unanimously found that Mrs. Nicholson's version of the accident was credible and that she entered the intersection at a time when it was reasonably safe to do so.

By the same unanimous vote in which Mr. Kelly was found to have been at fault, Mrs. Nicholson was exonerated from fault.

The plaintiff, Nancy King, now Nancy King Carr, filed a Motion for a Judgment Notwithstanding the Verdict and for a new trial. The Trial Judge denied the Motion on the basis that the result was correct.

Mrs. King then appealed the decision on the grounds that the jury was improperly charged and the verdict was incorrect as a matter of law. The Court of Appeal did not consider these arguments of the plaintiff but found that the jury's factual findings were manifestly erroneous on the basis of its own "reconstruction" of the accident. The Court of Appeal then rendered Judgment finding that Mr. and Mrs. Nicholson were liable for $300,000 and United Services Automobile Association, as the liability carrier of Mr. and Mrs. Nicholson, was liable for $200,000. Mr. and Mrs. Nicholson facing personal liability of $100,000, and United Services Automobile Association are seeking the reversal of the Appellate Court decision and the reinstatement of the jury's verdict.

ASSIGNMENTS OF ERROR

I.

THE COURT OF APPEAL ERRED IN REVERSING THE JURY'S VERDICT ON THE BASIS OF ITS OWN RECONSTRUCTION OF THE ACCIDENT, WHICH WAS FOUNDED ON IMPROPER ASSUMPTIONS, INCORRECT FORMULAS, AND FACTORS OUTSIDE OF THE RECORD.

Mrs. Nicholson testified that after turning into the right eastbound lane of Chef Highway, straightening out, and then traveling a distance of two to four van/bus lengths, she heard

a commotion to her right rear. Although she acknowledged that she was not absolutely certain of her estimates, she was certain that at the time that she heard the commotion and looked to her right rear, she was adjacent to a portable sign along the south side of the roadway. That sign was 54' past (east of) the bus stop at which the King children were standing. The commotion was caused by the Kelly automobile, which passed Mrs. Nicholson on the right, after having struck the King children. The King automobile then re-entered the highway and sped away.

The portable sign was noted by the investigating officer to be 149'11" from EC-SBLC. The defendant's expert determined that the sign was 172' from the center of the southbound lane of Crowder Blvd. This difference stems from the reference points used, as well as a slight error (approximately 10') in the officer's addition.

Although Mrs. Nicholson's testimony regarding the location of her van in relationship to the sign was undisputed at trial, and was certainly believed by the jury, the Appellate Court had to find that she was not adjacent to the sign when she heard the commotion and was passed by the Cougar, as a condition precedent to a reversal. Had the Appellate Court not altered Mrs. Nicholson's location, it would have been bound by its own decision in *Barry v. Billac*, La. App. 1971, 250 So.2d 516, in which the facts pertaining to the two vehicles were amazingly similar. In the *Barry* case, the motorist who turned left from a median into the right eastbound lane of Jefferson Highway was struck fromthe rear by a speeding vehicle. The impact occurred at a point 150' from Mr. Barry's entry onto Jefferson Highway. Although the jury found that Mr. Barry was negligent, the Court of Appeal held that Mr. Barry had made a reasonably safe entry into the intersection and, therefore, was free from fault. The Mr. Barry in that case is the same Judge Barry, who was one of

the Appellate Court Judges that heard the plaintiff's appeal. Thus, to justify a reversal against Mrs. Nicholson, the Appellate Court had to find that Mrs. Nicholson's van was not adjacent to the portable sign (149'11" or more from her point of entry onto Chef Highway) when she heard the commotion to her right rear.

There can be no doubt that the jury believed Mrs. Nicholson when she testified, without contradiction, that she was adjacent to the sign when she heard the commotion. The Appellate Court was required to give great weight to this factual finding under the mandates of this Honorable Court in *Canter v. Koehring Co.*, La. 1973, 283 So.2d 716, and *Arceneaux v. Domingue*, La. 1979, 365 So.2d 1330. The Appellate Court not only did not give great weight to this finding, but it systematically assumed facts, took improper "judicial notice" of other facts, and used incorrect and unproven formulas to find that Mrs. Nicholson was not where the jury determined her to be.

The issue, therefore, is whether the Appellate Court erred when, instead of giving great weight to the jury's findings of fact, it used its own "judically noticed" assumed facts, formulas, and figures to reverse the jury. Had the Appellate Court given proper weight to the jury's factual findings and begun its review on the basis that Mrs. Nicholson was adjacent to the sign at the time she heard the commotion, the Appellate Court could have reached no conclusion except that the jury was correct in finding that Mrs. Nicholson was not negligent. As will be shown later, the Court, by using its own facts and formulas was not only legally incorrect, but factually computed Mrs. Nicholson's position at a location which is not consistent with any testimony nor with good common sense.

A. The Assumed Arc - - - Beyond the Record and Clearly Erroneous.

To move the Nicholson vehicle away from the sign, the Court started by computing an arc (part of a perfect circle) that it determined was the curved path by which the Nicholson vehicle turned from the southbound lane of Crowder into the right eastbound lane of Chef Highway. The Nicholson vehicle certainly made this turn, but no one at the trial level could determine the exact angle of the curve. Mrs. Nicholson **estimated** that she was in the middle of the intersection or near the end of the intersection when she completed her entry into the right eastbound lane. Furthermore, it is common knowledge that vehicles do not turn corners in perfect arcs because a driver in most instances continues to turn the wheel to make adjustments throughout the maneuver. Accordingly, a wide range of estimated angles and paths could have been computed.

Considering these factors, the defendants-petitioners did not attempt to reconstruct the arc-path of the turn but computed time estimates on a direct (straight) line basis which obviously lessened the time and distance computations (those straight line computations being, therefore, less favorable to Mrs. Nicholson). However, the Appellate Court computed the point at which Mrs. Nicholson entered the right eastbound lane of Chef Highway by making an arc in which it assumed her exact path and further assumed that she turned in a perfect curve. There was no evidence to support either fact. An Appellate Court simply cannot consider or assume facts that are not in the record and, therefore, it commits error when it does so. *Promise v. McGlothin*, 460 So.2d 84 (La. App. 3 Cir. 1984), and *Davis v. Anderson*, 451 So.2d 1302 (La. App. 1 Cir. 1984).

B. The Rate of Acceleration - - - Improper Formula - Beyond Record - Improper Judicial Notice

The Court then decided that it would compute the van's rate of acceleration to the right eastbound lane of Chef Highway. Although no formulas for acceleration were discussed or are in evidence, the Court determined that the maximum acceleration rate for a vehicle was equal to its maximum deceleration rate. Thus, it computed the maximum acceleration for the van on the basis of its minimum stopping distance. Then the Court decided that since the van probably did not accelerate (to the maximum) it would gratuitously add one second to the time for acceleration. There was testimony concerning minimum stopping distances, but no correlation was made between stopping distances and acceleration rates. In fact there was evidence that the rate of acceleration is a variable depending on the size of the engine, the type of vehicle and the operator.

Not only is the Appellate Court's computation clearly erroneous, but even if the Court had an accurate acceleration chart, it could not have used it to make such a calculation. It has long been held that an Appellate Court cannot use speed and stopping charts and figures that are not in evidence. The rule exists for two reasons. First, the Appellate Court may not consider factors, including formulas, that are not in evidence. Second, neither the chart, formulas, or the user is subject to cross-examination. *Kinchen v. Rigamer*, 411 So.2d 482 (La. App. 4 Cir. 1982); and *Guidry v. Grain Dealers Mutual Ins. Co.*, La. App. 1967, 193 So.2d 873, citing Wigmore on Evidence 3rd Ed. V. VI Sec. 1690; and 32 C.J.S. Verbo Evidence, Sec. 964.

When an Appellate Court becomes an accident reconstructionist, using its own theories and formulas, the litigants are deprived of any right of cross-examination or of any right to

disprove the Court's new theory. The parties cannot challenge those computations, which have been made by non-experts, even if the computations are clearly wrong. Ironically, the Appellate Court's theory regarding the relationship between acceleration and deceleration and its ability to compute the rate of acceleration is contrary to the evidence in this case and to its earlier recognition that even stopping distances themselves are subject to many variables. *Southern Farm Bureau Cas. Ins. Co. v. Home Indemnity Co.*, La.App. 1966, 191 So.2d 191.

The Court cannot resort to judicial notice as a basis for using its own formulas or for making the assessment that traffic would have been heavy in the eastbound lanes of Chef Highway during the morning hours. The Court gave some significance to its own observation that early morning traffic on Chef Highway would have been heavy. Judicial notice of a fact can be taken only when there is a fact that is so generally known that it is " . . . regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence." *State Block, Inc. v. Poche*, 444 So.2d 680 (La.App. 5 Cir. 1984) and *Miranne v. State Farm Mutual Automobile Ins. Co.*, 1951 Orl., 54 So.2d 538. "Additionally, it mistakes the proper function and theory of judicial notice to resolve a disputed issue of material fact by taking judicial notice of its correct determination without permitting evidence." *Acadia-Vermilion Rice Irrigating Co. v. Broussard*, La.App. 1966, 185 So.2d 908; and *Pierce v. Board of Supervisors*, La.App., 1979, 392 So.2d 460.

The Court clearly erred in both respects. The computation of the rate of accleration is not only not common knowledge, but it is in fact erroneous. By taking "judicial notice" of the alleged formula, defendants-petitioners are deprived of the ability to prove its incorrectness. Defendants, Mr. and Mrs.

Nicholson, are being subjected to personal liability of $100,000 in addition to the $200,000 liability wrongfully imposed upon USAA on the basis of the Appellate Court's use of a formula which said defendants have no right to challenge under the decision that was rendered.

Additionally, the Court's statement that Mrs. Nicholson would have had to face rush hour traffic was refuted by the evidence. Neither Mrs. Nicholson nor Mr. Kelly described heavy traffic in the eastbound (outbound) lanes of travel. Furthermore, while it may be assumed that inbound traffic to New Orleans may be heavy during the early morning hours, the same assumption is not applicable for outbound traffic from New Orleans. Traffic conditions on certain streets is generally not a proper subject for judicial notice even if it is within the particular knowledge of some member of the Court. *Miranne v. State Farm Mutual Automobile Ins. Co.*, Supra.

However, in this case, the existence of heavy eastbound traffic was negated by Mrs. Nicholson who said that no traffic was approaching for over two blocks when she entered Chef Highway. Furthermore, Mr. Kelly identified only one other automobile that was proceeding near him in the same eastbound lanes. The Court, therefore, clearly erred in making the foregoing assumptions and computations, which were obviously intended as another step in its run from the jury's factual findings, particularly the one pertaining to the location of the van near the sign.

C. Length of Travel in the Right Eastbound Lane - - - Improper Use of General Estimates

After moving the Nicholson van from the median into the right eastbound lane of travel, the Court then had to shorten the time and distance the van was in that right lane to keep it from reaching the sign. The Appellate Court found that the Nicholson van moved only two to three van lengths forward in the right eastbound lane before Mrs. Nicholson noted the commotion to her right rear. Mrs. Nicholson testified that this distance was only an estimate and perhaps she traveled as much as three to four van lengths forward in the right eastbound lane. She also made an estimate that the length of her van was approximately 20 feet. To use general and non-specific estimates of this nature to compute an exact reconstruction of an accident is improper. The Court of Appeal for the Fourth Circuit in an earlier case denounced such an approach.

> "Counsel for the plaintiffs cross-examined the officers in an attempt to get precise estimates of the distances, speeds, angles of deflection and time sequences involved. Requiring such testimony is not essentially unfair, but it must be recognized for what it usually is - - a patchwork of guesses, estimates and after-the-fact interpolations. We cannot hold that a witness who cooperates by giving this type of testimony is to be discredited merely because his computations lie slightly off the line of mechanical precision." *O'Brien v. City of New Orleans*, La. App. 1971, 243 So.2d 352 (p. 354).

Not only did the Appellate Court fail to maintain judicial consistency, but it made further assumptions which touch

upon the ludicrous. The Court decided to reconstruct the distance that was traveled in the right lane by the Nicholson vehicle on the basis of two to three van lengths rather than three to four van lengths. Additionally, instead of accepting Mrs. Nicholson's estimate of a van length (20') to correlate with her estimate of the distance traveled, the Court decided to use the police officer's estimate of a van length (14') to correlate with Mrs. Nicholson's estimate of the distance traveled. This improper mixing of the police officer's estimate of a van length with Mrs. Nicholson's estimate of a van length in order to shorten the distance traveled by the Nicholson van in the right lane is totally improper and violates not only its prior ruling but all sense of fair play.

On the basis of mixing these estimates, the Appellate Court determined that Mrs. Nicholson traveled only 28' to 42' forward in the right eastbound lane before she heard the commotion to her right rear. Had the Court used Mrs. Nicholson's estimates on a consistent basis, then the distance would have been extended to 80'. The jury certainly had more right to believe the distance was 80' than the Appellate Court had the right to believe it was only 28' to 42'. The Appellate Court's actions clearly conflict with the rules pertaining to proper appellate review. The jury's " . . . evaluation of credibility and inferences of fact should not be disturbed even though the Appellate Court may differ with the jury's conclusion." *Gibson v. Winn-Dixie La., Inc.*, La. App. 1983, 426 So.2d 731.

The effect of the mixing of the estimates along with the other errors has resulted in an artificially produced finding of fact which is totally contradictory with all other evidence. The particular error regarding the location at which Mr. Kelly reached and passed Mrs. Nicholson is covered in Section II.

D. The Point of Departure from the Road - - Improper Assumption for the Location of the Nicholson Vehicle.

The Court tried to justify its assumptions by stating that there was the "inference" that the Nicholson van entered the right lane of travel a calculable distance from the Kelly automobile based on the point at which the Kelly automobile left the roadway. No one, except Mr. Kelly whose testimony was clearly rejected by the jury, described that distance. However, the Appellate Court decided "The fact that the automobile went up on the curb 42' 11" past the intersection to avoid hitting the van supports the inference that the rear of the van was not much farther past the intersection than 43' at that moment and the front not much than 57'."

Not only is it ludicrous to believe that the front of the Kelly car and the rear of the Nicholson van were only inches or a couple feet apart when the Kelly automobile left the roadway, but not even Mr. Kelly testified to such an extraordinary series of events. Furthermore, merely because the Kelly automobile left the roadway at a point 43' east of EC-SBLC, does not prove that the Nicholson van was 57' rather than 70', 90' or 110' ahead of the Kelly automobile when the Nicholson van entered the right lane of travel and the Kelly automobile left the roadway. Not only does no such correlation exist, but the Court ignored the fact that before the Kelly automobile left the roadway, the driver would have had to see the van and react to it, and his automobile would have had to move laterally to the right. Furthermore, it ignores the finding that Mr. Kelly did not see the Nicholson vehicle enter the right lane but, because of distraction by radio or doughnuts, he did not notice the Nicholson vehicle until it was fully in the right eastbound

lane of travel and heading straight ahead. The contrary findings of the Appellate Court not only conflict with the jury's obvious findings, but are based on faulty assumptions.

II.

THE COURT OF APPEAL ERRED BECAUSE IT REVERSED A JURY'S VERDICT ON THE BASIS OF ITS OWN RECONSTRUCTION WHICH RECREATED THE ACCIDENT IN A FASHION WHICH WAS CONTRARY TO THE TESTIMONY OF BOTH DRIVERS ON ONE OF THE MOST ESSENTIAL FACTS.

The conclusion of the Appellate Court not only conflicts with the obvious findings of the jury, but also conflicts with one of the most essential facts in the case. The bus stop, at which the King children were standing, was located approximately 93' east of the EC-SBLC. If the Nicholson vehicle was only 64' east of the EC-SBLC when the Kelly vehicle passed it, as determined by the Appellate Court, then at the time the Kelly vehicle passed the Nicholson van, the children had not been reached and were actually still 30' to the east ahead of both vehicles. **However, both Mr. Kelly and Mrs. Nicholson testified that Mr. Kelly passed the Nicholson van only after Mr. Kelly struck the children.** Therefore, the Appellate Court's computation produces a result which is clearly erroneous because it is contrary to this most important and undisputed fact. Under the Appellate Court's computation, the Kelly automobile would have struck the children only after Mr. Kelly passed the van. The evidence in the case is clear and undisputed that Mr. Kelly struck the children before passing the van. Such an incorrect result, which is based on erroneous assumptions and incorrect formulas cannot be permitted to stand.

III.

THE COURT OF APPEAL ERRED IN FAILING TO GIVE GREAT WEIGHT TO THE JURY'S EVALUATION OF CREDIBILITY AND FINDINGS OF FACT.

In order for the mandates in the *Canter* and *Arceneaux* cases to have effect, the Appellate Court must give more than lip service to them. In this case, the Appellate Court did not even pay lip service to the restraints on judicial review before using an improper and erroneous reconstruction of an accident to reverse a jury's factual findings.

There were no independent eye witnesses to the accident itself. Thus, the jury had to resolve factual disputes on the basis of its evaluation of the credibility of the parties and the reasonableness/believability of their versions. The jury clearly found that: 1) Mrs. Nicholson entered the intersection when approaching traffic was over two blocks away; 2) she proceeded to the right lane in a reasonable fashion; and 3) she traveled to a point adjacent to the portable sign "at least 149'11" from the point of entry" when the Kelly car reached and passed her. Such actions on her part did not constitute negligence in the eyes of the jury and in the eyes of the law, had *Barry v. Billac*, supra been followed.

The jury also found that: 1) Mr. Kelly was speeding in the right eastbound lane of travel; 2) he was distracted by either the radio or his concern for his doughnuts and, therefore, took his eyes off the road ahead of him for some period of time; and 3) when he looked forward he saw that the Nicholson van was fully in the right eastbound lane and proceeding ahead in that lane. Because of Mr. Kelly's speed and inattentiveness, he instinctively swerved to the right, left the roadway, and struck the King children. His negligence

was determined by the jury to be the sole cause of the accident. The record clearly support these findings.

If the Appellate Court felt that the foregoing factual findings did not support the conclusion that Mrs. Nicholson was free from fault, the Court would not have had to reconstruct the accident in order to find fault on the part of Mrs. Nicholson. The jury's factual findings, however, demanded that Mrs. Nicholson be exonerated from liability. Such a conclusion is supported by the Court's decision in *Barry v. Billac*, Supra.

Unfortunately, the Appellate Court failed to apply the appropriate standards for judicial review. Instead of recognizing the jury's assessment of credibility, the Court became side tracked because of the testimony of Duaine Evans, an expert called by defendants. Mr. Evans did not reconstruct the accident. He simply presented the jury with a few facts including: 1) The time for a vehicle to accelerate from zero to a given speed within a given straight line distance; 2) the distance in feet persecond that a vehicle would travel at a speed of 45 mph; and 3) the stopping distance for a vehicle traveling at 40 mph.

The primary purpose of this expert testimony was simply to show that since Mr. Kelly's car did not reach Mr. Nicholson's van until she was alongside the portable sign, her testimony was reasonable when she said that there were no cars within two blocks of the intersection when she entered it. Mr. Evans testified that using a speed rate of 75' per second, the Kelly car would have been 1,043' away from the intersection when Mrs. Nicholson first entered it. Admittedly, Mr. Evans made a mistake in his calculation because a vehicle traveling at a speed of 45 mph moves at a rate of 66' per second rather than 75' per second. The correction of that miscalculation is insignificant since, even with the correction,

the Kelly automobile would have been 904' away when Mrs. Nicholson entered the intersection. The distance was still well over two blocks, which was the point that defendants made.

The Court further attacked defendant's expert on the grounds that they disagreed with his arc of entry for Mrs. Nicholson's van. No arc of entry was computed by Mr. Evans during the direct examination by defendant's counsel because it obviously could not be computed. A discussion of the arc arose only on cross-examination. Whether the jury chose to accept or reject the figures presented by Mr. Evans after cross-examination is entirely within the province of the jury. *Gonzales v. Lockett*, La. App. 1982, 410 So.2d 265. The jury did not have to accept the testimony of Mr. Evans, corroborating that of Mrs. Nicholson, to find that Mrs. Nicholson was free from fault. The jury only had to accept Mrs. Nicholson's testimony. The Appellate Court erroneously failed to recognize the fact when it embarked upon its reconstruction of the accident in an attempt to refute Mrs. Nicholson's testimony.

> "Although we, as the Appellate Court, may disagree with the Trial Court's conclusions and feel that our own evaluations and inferences are as reasonable, where there is a conflict in testimony, we must give great weight to the factual conclusions of the Trial Court and cannot disturb the reasonable evaluations and inferences." *DiCarlo v. State Farm Mutual Ins. Co.*, La. App. 1982, 418 So.2d 30; also: *Gibson v. Winn-Dixie, La., Inc.*, supra; and *Veal v. Church's Chicken of New Orleans*, 459 So.2d 703 (La. App. 4 Cir. 1984).

The Court clearly erred when it failed to recognize the basis for the jury's verdict and reversed the jury because it disagreed with it. The jury obviously recognized that Mr. Kelly, by his testimony, was just trying to implicate someone else to justify his own reckless actions. The Appellate Court not having the benefit of an independent evaluation of the parties, cannot set aside these conclusions.

The Appellate Court decided to believe Mr. Kelly's version of the incident. The Court concluded that Mr. Kelly was unable to veer into the middle lane apparently in part because the van was turning through the middle lane and because of the presence of a black car in the middle lane. The Appellate Court clearly erred because of the many versions given by Mr. Kelly, he stated on more than one occasion that he did not see the van turning in front of him. Further, he also placed the black Chevrolet behind him in the center lane. Thus, the Appellate Court erred in not recognizing the basis for the jury's decision and not maintaining it.

IV.

IN THE ALTERNATIVE, THE APPELLATE COURT ERRED IN NOT ASSESSING PERCENTAGES OF FAULT AMONG THE DEFENDANTS.

The accident in this case occurred after the effective date for the application of comparative negligence. When the articles of the Civil Code were amended to effect the application of comparative negligence, Art. 2103 of the Civil Code was altered to provide for the mandatory division of a debt between debtors in solido, whether the obligation arises from contract or tort.

> "When two or more debtors are liable in solido, whether the obligation arises from a

> contract, an offense, or a quasi-offense, the debt **shall** be divided between them. If the obligation arises from a contract or a quasi-contract, each debtor is liable for his virile portion. If the obligation arises from an offense or a quasi-offense, it shall be divided in proportion to each debtor's fault."

The use of the compulsory term "shall" has been recognized and applied in another Fourth Circuit case involving an innocent claimant. In *Weir v. Gasper*, 459 So.2d 655 (La. App. 4 Cir. 1984), the Appellate Court found that a trial judge erred by failing to assess percentages of fault. "Although the innocent plaintiff bus passenger is entitled to seek full recovery from any one of the solidary defendants cast in judgment, the apportionment of each judgment-debtor's fault may determine the amount of contribution owed by the debtors to each other." Thus, assuming that the Appellate Court was correct in reversing the jury's factual findings, which is denied, it still erred in this case, having failed to adhere to the mandatory requirement of the La. Civil Code and to its own prior decision. Such a failure to maintain consistency in the administration of justice constitutes clear error and must be corrected.

WHEREFORE, the petitioners, Linda Nicholson and Donald Nicholson and United Services Automobile Association, pray that this Honorable Court issue a Writ of Certiorari or Review directed to the Honorable Judges, Court of Appeal, Fourth Circuit, directing them to send up the record of this case for examination, and to the end that this Court might take the case (or remand the same with instructions) and pronounce judgment reversing the Court of Appeal, Fourth Circuit, and granting appropriate relief herein to defendants-petitioners and for all general and equitable relief.

Respectfully submitted,

SCHAFER & SCHAFER

BY: /s/ TIMOTHY G. SCHAFER
TIMOTHY G. SCHAFER
328 Lafayette Street
New Orleans, LA 70130
(504) 522-0011

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

TIMOTHY G. SCHAFER, who, after being first duly sworn, according to law, did depose and say that:

He is the attorney of record for Linda and Donald Nicholson and United Services Automobile Association, petitioners in the above and foregoing cause. He had prepared and read the foregoing Petition for Certiorari and Review, and the allegations thereof are true and correct to the best of his knowledge, information, and belief. This application is filed in good faith and not for purposes of delay. Notice of intention to apply for writs and copies of this petition were duly served, prior to the filing of this petition with this Honorable Court, upon the Clerk, Court of Appeal, Fourth Circuit, New Orleans, Louisiana, by hand delivery, William F. Wessel, 127 Camp Street, New Orleans, Louisiana, and C. Gordon Johnson, Jr., 704 Carondelet St., New Orleans, Louisiana 70130, by placing a copy of the same in the United States Mail, properly addressed, and with sufficient postage affixed.

/s/ TIMOTHY G. SCHAFER
TIMOTHY G. SCHAFER

Sworn to and subscribed
before me this _____ day
of April, 1986.

/s/ WADE RANKIN
NOTARY PUBLIC

THE SUPREME COURT
OF THE STATE OF LOUISIANA

ELTON J. KING; NANCY H. KING

VS.

STATE FARM MUTUAL AUTOMOBILE INS. CO., MANCY C. KELLY ET AL

NO. 86-C-0650

IN RE: Nicholson, Linda; Nicholson, Donald; United Services Auto. Assn.; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number CA 3351, CA 3352; Parish of Orleans Civil District Court Div. "D" Number 81-15706

May 12, 1986

Denied.

WFM
JAD
PFC
JLD
JCW
HTL

BLANCHE, J., would grant the writ.

Supreme Court of Louisiana
May 12, 1986

/s/ FRAN J. LaBRANCH
FRAN J. LaBRANCH
Clerk of Court
For the Court